



REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS,

BY

GEORGE FREDERICK HARMAN,
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,
EDITOR.

VOL. XXIX.

CONTAINING THE CASES DETERMINED
FROM EASTER TERM, 41 VICTORIA, TO HILARY TERM, 42 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:
ROWSSELL & HUTCHISON.
1879.

ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

J U D G E S
OF THE
COURT OF COMMON PLEAS.

THE HON. ADAM WILSON, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

Attorney-General :

THE HON. OLIVER MOWAT.

A TABLE

OF THE

NAMES OF CASES REPORTED IN THIS VOLUME.

A.	Page	C.	Page.
Arbuckle, McCarthy v.	529	Corporation of Southwold, McArthur	
		and, Re	216
		Corporation of Toronto, Trotter v.	365
		Coulson v. O'Connell.	341
B.		D.	
Ball, Wapels v.	403	Denham et al., Churchill v.	474
Bank, Consolidated, v. Cameron.	71	Denmark v. McConaghy et al.	563
Bank, Consolidated, v. Henderson.	549	Dixon, Sanderson v.	377
Beckett et al., Perkins v.	395	Duff, Regina v.	255
Benedict v. Ker.	410		
Black v. Coleman.	507		
Britton v. Knight et al.	567		
Brogan v. Manufacturers', &c., Mutual			
Ins. Co.	414	E.	
Burrows et al., Mason v.	138	Earl, Kelly v.	477
		Englehart, Petrolia Crude Oil and	
		Tanking Co. v.	157
C.		F.	
Cameron, Consolidated Bank v.	71	Fields v. Rutherford et al.	113
Campbell v. Spurgeon.	86	Fortier v. Royal Canadian Ins. Co. ...	353
Canadian Mutual Ins. Co., Gauthier v.	593		
Churchill v. Denham et al.	474		
Clendinning, Parkinson v.	13		
Coleman, Black v.	507		
Consolidated Bank v. Cameron.	71	G.	
Consolidated Bank v. Henderson,	549	Gauhan v. St. Lawrence and Ottawa	
Corporation of Ontario, Reynolds v. ...	488	R. W. Co.	102
Corporation of South Dorchester,		Gauthier v. Canadian Mutual Ins. Co.	593
Macdonald v. ...	249		

G.		M.	
	Page.		Page.
Geraldi v. Provincial Ins. Co.	321	Montreal and Ottawa R. W. Co., Mc-	
Ginty, Newman v.	34	Kenzie v.	333
Gordon, Niagara District Mutual Ins.		Mottashed, Tufts v.	539
Co. v.	611	Murphy v. Yeomans.	421
H.		Mc.	
Hand-in-Hand Mutual Ins. Co., Law		Macaulay, &c., Minister of Education	
v.	1	and, Re.	122
Henderson, Consolidated Bank v.	549	Macdonald v. Corporation of South	
Herod, Regina v.	428	Dorchester,	249
Hewitt, Ontario Copper Lightning Rod		Mackenzie, Stadacona Ins. Co. v.	10
Co. v.	491	McArthur and Corporation of South-	
Hollingshead, Leys v.	66	wold, Re.	216
I.		McCarthy v. Arbuckle.	529
Inglis v. Wellington Hotel Co.	387	McConaghy et al., Denmark v.	563
K.		McGugan v. Manufacturers, &c., Mu-	
Kelly v. Earl.	477	tual Ins. Co.	494
Ker, Benedict v.	410	McKay, Knowlton et al. v.	601
Knapp, Stone v.	605	McKenzie v. Montreal and Ottawa R.	
Knight et al., Britton v.	567	W. Co.	333
Knowlton et al. v. McKay.	601	McNamee, O'Connor v.	237
L.		McQueen v. Phoenix Mutual Ins. Co.	511
Law v. Hand-in-Hand Mutual Ins. Co.	1	McSloy, Loucks v.	54
Leys v. Hollingshead.	66	N.	
Loucks v. McSloy.	54	Nasmith v. Manning.	34
M.		Newman v. Ginty.	34
Manning, Nasmith v.	34	Niagara District Mutual Ins. Co. v.	
Manufacturers, &c., Mutual Ins. Co.,		Gordon.	611
Brogan v.	414	Niagara Election Case, Re.	261
Manufacturers, &c., Mutual Ins. Co.,		O.	
McGugan v.	494	O'Connell, Coulson v.	341
Mason v. Burrows et al.	138	O'Connor v. McNamee.	237
Miller v. Reid.	576	Ontario Copper Lightning Rod Co. v.	
Minister of Education and Macaulay,		Hewitt.	491
&c., Re.	122	Ontario, Corporation of, Reynolds v..	488
		Ottawa Agricultural Ins. Co., Sly v. 28,	557
		P.	
		Parkinson v. Clendinning.	13
		Parsons v. Queen Ins. Co.	188
		Parsons v. Victoria Mutual Ins. Co..	22
		Perkins v. Beckett et al.	395

P.		S.	
	Page.		Page.
Petrolia Crude Oil and Tanking Co. v.		St. Lawrence and Ottawa R. W. Co.,	
Englehart.....	157	Gauhan v.....	102
Phoenix Mutual Ins. Co., McQueen v.	511	Stone v. Knapp.....	605
Provincial Ins. Co., Gerald v.....	321	Sun Mutual Ins. Co., Wright v.....	221
Q.		T.	
Queen Ins. Co., Parsons v.....	188	Thistle v. Union Forwarding and R. W.	
		Co.....	76
R.		Toronto, Corporation of, Trotter v...	365
Reid, Miller v.....	576	Trotter v. Corporation of Toronto...	365
Regina v. Duff.....	255	Tuffts v. Mottashed.....	539
Regina v. Herod.....	428		
Reynolds v. Corporation of Ontario..	488	U.	
Rooney v. Rooney.....	347	Union Forwarding and R. W. Co.,	
Royal Canadian Ins. Co., Fortier v..	353	Thistle v.....	76
Rutherford et al., Fields v.....	113		
Ryan v. Ryan.....	449	V.	
S.		Victoria Mutual Ins. Co., Parsons v..	22
Sanderson v. Dixon.....	377		
Sly v. Ottawa Agricultural Ins Co.28,	557	W.	
Smith, Young v.....	109	Wapels v. Ball.....	403
South Dorchester, Corporation of,		Wellington Hotel Co., Inglis v.....	387
Macdonald v.....	249	Wilson v. Standard Ins. Co.....	308
South Huron Election Case, Re.....	301	Wright v. Sun Mutual Ins. Co.....	221
Southwold, Corporation of, McArthur			
and, Re.....	216	Y.	
Spurgeon, Campbell v.....	86	Yeomans, Murphy v.....	421
Stadacona Ins. Co. v. Mackenzie....	10	Young v. Smith.....	109
Standard Ins. Co., Wilson v.....	308		

A TABLE

OF THE

NAMES OF CASES CITED IN THIS VOLUME.

A.

NAME OF CASE CITED.	WHERE REPORTED	Page of Vol.
Ableman v. Booth	21 Howard U. S. 506.....	267
Agra and Masterman's Bank, Re.....	L. R. 2 Ch. 391	338
Allen v. England.....	3 F. & F. 49	453, 455
Anderson v. Fitzgerald.....	4 H. L. 507.....	313
Anderson v. McEwan.....	8 C. P. 532.....	544
Andres's Case	L. R. 8 Ch. D. 126.....	390
Angell v. Hartford Ins. Co.....	59 N. Y. 171.....	202
Annis and Corporation of Mariposa.....	25 C. P. 180.....	218
Appleton v. Lepper	20 C. P. 138	239
Argenteuil Election Case, Owens v. Cushing	20 L. C. Jur. 86.....	271
Ashby v. White	2 Ld. Raym. 938.....	297
Ashford v. Price.....	3 Stark. 185.....	240
Atkinson v. Denby.....	7 H. & N. 934	492
Atkyns v. Kinnier.....	4 Ex. 776	166
Attorney-General v. Sillem	2 H. & C., Am. ed., p. 1022.....	298
Austin v. Ferguson.....	25 U. C. R. 273.....	80

B.

Bailey v. Bleecker	5 C. L. J. N. S. 99,	342
Bailiffs of Romney Marsh v. Corporation of Trinity House.....	L. R. 5 Ex. 204, 7 Ex. 247.....	84
Bank of Hamilton v. Western Ins. Co..	38 U. R. 609	603
Barlow v. Bishop.....	1 East 432.....	400
Barwell v. Brooks	3 Doug. 371	298
Baylis v. LeGros.....	4 C. B. N. S. 537	79, 80
Bayliss v. Fisher.....	7 Bing. 153	509
Behn v. Burness.....	3 B. & S. 751	560
Bell v. McLean.....	18 C. P. 416.....	505, 407
Belshaw v. Bush.....	11 C. B. 191.....	501, 506
Benson v. Ottawa Agricultural Ins. Co..	42 U. C. R. 282...26, 313, 501, 519, 559, 560	
Bertie v. Beaumont.....	16 East 33.....	455
Betts v. Burch.....	4 H. & N. 506.....	603, 604
Bewdley Election Case	1 O. & H. 174.....	302, 307
Bickford v. Great Western R. W. Co. .	28 C. P. 516.....	188
Billington v. Canadian Mutual Ins. Co..	39 U. C. R. 433.....	26
Billington v. Provincial Ins. Co.....	24 Grant 311, 2 App. 158....9, 314, 518	

NAME OF CASE CITED.	B.	WHERE REPORTED.	Page of Vol.
Bishop of Meath v. Marquis of Winchester	3	Bing. N. C. 200	531
Blair v. Ellis	34	U. C. R. 466	528
Blakely Ordnance Co., Re		L. R. 3 Ch. 154	336, 338
Bleakely v. Niagara District Mutual Ins. Co.	16	Grant 198	7
Bletcher v. Burn	24	U. C. R. 259	476
Bloxam's Case	33	Beav. 529	45
Blythe's Case		L. R. 4 Ch. D. 140	390
Booth v. Sutherland	10	C. L. J. N. S. 257	307
Bottomley v. Nuttall	5	C. B. N. S. 122	501
Bowry v. Bennett	1	Camp. 349	479
Boyle v. Corporation of Dundas	27	C. P. 129	252, 253
Braid v. Great Western R. W. Co.	10	C. P. 137	368
Braithwaite v. Gardiner	8	Q. B. 473	398, 401
British and American Telegraph Co. v. Colson		L. R. 6 Ex. 108	44, 45
Brown v. Blackwell	35	U. C. R. 239	167
Brown v. Duncan	10	B. & C. 93	479
Brown v. Taggart	10	U. C. R. 183	167
Budd v. Fairman	8	Bing. 48	492
Bullivant v. Manning	41	U. C. R. 517	46
Bunker v. Emmany	28	C. P. 438	62
Burchfield v. Moore	3	E. & B. 683	143
Burdett v. Abbott	14	East 102	303
Burkinshaw v. Nicolls		L. R. 3 App. 1005	394
Burnett v. Lynch	5	B. & C. 589	575
Burnham v. Galt	16	Grant 417	89
Burns v. Corporation of Toronto	42	U. C. R. 560	253
Burns v. Kerr	13	U. C. R. 458	239
Burroughes v. Bayne	5	H. & N. 296	104
Burwell v. Brooks	3	Doug. 371	208
Butchart v. Dresser	4	De G. M. & G. 542	425
Buttemere v. Hayes	5	M. & W. 456	591

C.

Cairns v. Water Commissioners of Ottawa	25	C. P. 551	370
Calvert v. Baker	4	M. & W. 417	148
Calvin v. Provincial Ins. Co.	20	C. P. 21	200
Cameron v. Holland	29	U. C. R. 506	384
Campbell v. Edwards	24	Grant 152	166
Canada Landed Credit Co. v. Canada Agricultural Ins. Co.	17	Grant 418	9, 31
Cannan v. Bryce	3	B. & Al. 179	479, 484, 485
Carr v. Montefiore	5	B. & S. 408	361
Carruthers v. Ardagh	20	Grant 579	500
Carveth v. Greenwood	3	P. R. 175	543, 544
Catheart v. Hardy	2	M. & S. 534	591
Chandelor v. Lopus	1	Sm. L. C., 7th ed., 173	492
Chandler v. Doulton	2	H. & C. 533	509, 510
Charter v. Greame	13	Q. B. 216	592
Chatillon v. Canadian Mutual Ins. Co.	27	C. P. 450	501
Chusan, The	2	Story R. 455	266
Churcher v. Cousins	28	U. C. R. 540	581
Churcher v. Johnston	34	U. C. R. 528	581
City Bank v. Smith	20	C. P. 93	581
Clark v. Buchanan	25	Grant 559	404, 405

NAME OF CASE CITED.	C.	WHERE REPORTED.	Page of Vol.
Clark v. Sarnia Street R. W. Co.....	42	U. C. R. 39.....	339
Clark v. Smith.....	13	Peters 195, 202.....	266
Cleland's Case.....		L. R. 14, Eq. 387.....	390
Colbeck v. Corporation of Brantford.....	21	U. C. R. 276.....	252
Cole v. Bank of Montreal.....	39	U. C. R. 54.....	201
Cole v. Sackett.....		1 Hill 516.....	501
Collet v. Collet.....		1 Atk. 11.....	532
Collett v. Morrison.....		9 Hare 162.....	202
Collins v. Evans.....		5 Q. B. 820.....	492
Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.	18	Howard 318.....	202, 207
Consolidated Bank v. Henderson.....	29	C. P. 551.....	610
Cooley v. Smith.....	40	U. C. B. 543.....	572
Cooper v. Phibbs.....		L. R. 2 H. L. 149.....	167
Corbett v. Brown.....		8 Bing. 3.....	492
Cornfoot v. Fowke.....		6 M. & W. 358.....	492
Corporation of Frontenac v. Corporation of Kingston.....	20	C. P. 491, 30 U. C. R. 584.....	490
Cotter v. Sutherland.....	16	C. P. 357.....	404
Coverdale v. Eastwood.....		L. R. 15, Eq. 121.....	532
Coward v. Gregory.....		L. R. 2 C. P. 153.....	79
Cowley v. Mayor, &c., of Sunderland.....		6 H. & N. 565.....	369
Cramer v. Mott.....		L. R. 8 Q. B. 357.....	510
Crawley, Re.....	18	W. R. 1125.....	240
Crombie v. Jackson.....	34	U. C. R. 575.....	268
Croockewit v. Fletcher.....		1 H. & N. 893.....	143
Crouch v. Credit Foncier of England, (Limited)		L. R. *8 Q. B. 374.....	336, 338

D.

Dagenham Dock Co., Re.....		L. R. 8 Ch. 1022.....	603
Darling v. Rice.....		1 App. 43.....	552, 609, 610
Davidson v. Cooper.....	13	M. & W. 343.....	143, 147
Davidson v. Grange.....		4 Grant 377.....	44
Davies' Case.....	26	L. T. N. S. 650.....	44
Davies v. Jenkins.....		L. R. 6 Ch. D. 728.....	551
Davis v. Canada Farmers' Mutual Ins. Co.	39	U. C. R. 452.....	26, 200
Davis v. Henderson.....	29	U. C. R. 344.....	454
Davis v. Vandecar.....	28	C. P. 185.....	341
Davis v. White.....	16	Grant 312.....	89
Dawson v. Graham.....	41	U. C. R. 532.....	166
Day v. Day.....		L. R. 3 P. C. 751.....	453
Dear v. Western Assurance Co.....	41	U. C. R. 553.....	201, 501, 519, 528
De Biel v. Thomson.....		3 Beav. 469.....	532
De La Touche's Settlement, Re.....		L. R. 10 Eq. 599.....	167
Denison v. Smith.....	43	U. C. R. 503.....	397
Denny v. Montreal Tel. Co.....	42	U. C. R. 577.....	252
Deverill v. Grand Trunk R. W. Co.....	25	U. C. R. 517.....	118
Dickson v. Equitable Ins. Co.....	18	U. C. R. 286.....	31, 562
Dickson v. Provincial Ins. Co.....	24	C. P. 157.....	596
Diggs v. Wolcott.....		4 Cranch 178.....	267
Dimech v. Corlett.....	12	Moo. P. C. 199, 229.....	167
Dimes v. Grand Junction R. W. Co.....	17	Jur. 73.....	566
Dixie v. Worthy.....	11	U. C. R. 328.....	553
Doe dem. Baker v. Coombes.....		9 C. B. 714.....	462
Doe dem. Bennett v. Turner.....		9 M. & W. 644.....	472

D.

NAME OF CASE CITED.	WHERE REPORTED.	Page of Vol.
Doe dem. Corbyn v. Bramston	4 A. & E. 63	453
Doe dem. Dormer v. Wilson	4 B. & A. 303.....	573
Doe dem. Edney v. Benham	7 Q. B. 976.....	453
Doe dem. Groves v. Groves	10 Q. B. 486.....	471
Doe dem. Milburn v. Edgar	2 Bing N. C. 498.....	453
Doe dem. Morecraft v. Meux	4 B. & C. 606	79
Doe dem. Neale v. Samples'	8 A. & E. 151	531
Doe dem. Perry v. Henderson	3 U. C. R. 486.....	453, 455
Doe dem. Quinsey v. Caniffe	5 U. C. R. 602.....	453
Doe dem. Shepherd v. Bayley	10 U. C. R. 310.....	472
Doe dem. Silverthorn v. Teal	7 U. C. R. 370.....	453
Doe dem. Smyth v. Smyth	6 B. & C. 112	574
Doe dem. Stanway v. Rock	4 M. & G. 30.....	462, 471
Doe dem. Willis v. Birchmore	9 A. & E. 662.....	454
Doherty v. Williams	30 U. C. R. 215.....	239
Dow v. Black.....	L. R. 6 P. C. 272.....	267
Dowling, Re.....	L. R. 4 Ch. D. 689	398
Drake v. Mitchell	3 East 251.....	501
Drayton v. Dale.....	2 B. & C. 293	397, 400
Drinkwater v. Deacon, In re Launceston Election Petition.....	L. R. 9 C. P. 626.....	303, 305, 307
Dundas v. Dutens.....	2 Cox 235	532
Dundas v. Johnson.....	24 U. C. R. 547.....	239, 453
Dunn v. Irwin.....	25 C. P. 111.....	397

E.

Earl Beauchamp v. Winn.....	L. R. 6 H. L. 223.....	167, 526
East Gloucestershire R. W. Co. v. Smith.	L. R. 3 Ex. 15.....	43
Ebbs v. Bulnois	L. R. 10 Ch. 479.....	398
Elkington's Case.....	L. R. 2 Ch. 511.....	51, 390, 391, 394
Elliott v. Clayton	16 Q. B. 581.....	398
Ellis v. Crawford.....	5 Ir. L. R. 402	453, 454, 456
Ely v. Peck	7 Conn. 239	266
England v. Cowley.....	L. R. 8 Ex. 126.....	103
Enthoven v. Hoyle.....	13 C. B. 373.....	336
Eureka Ins. Co. v. Robinson.....	56 Penn. 256.....	520
Everett v. London Assurance Co	19 C. B. N. S. 126.....	83

F.

Falle and Corporation of Tilsonburg	23 C. P. 167	218
Farrell v. O'Neill.....	22 C. P. 31.....	384
Fawcett v. Mothersell.....	14 C. P. 104	114, 118
Fell v. Whittaker	L. R. 7 Q. B. 120.....	509
Fenwick v. Schmalz.....	L. R. 3 C. P. 313.....	79
Few v. Perkins	L. R. 2 Ex. 92.....	79
Field v. Soule.....	4 Russ. 112	551
Fish v. Cottenet	44 N. Y. 538	202
Fitton v. Accidental Death Ins. Co.....	17 C. B. N. S. 122.....	234
Fennings v. Grenville.....	1 Taunt. 241.....	424
Foley v. Smith.....	20 L. J. N. S. 621.....	240
Ford, Ex parte	L. R. 1 Ch. D. 521.....	398
Ford v. Proudfoot.....	9 Grant 478.....	405, 407
Foster v. Crabb.....	11 C. P. 136.....	424
Forbes' Case.....	20 W. R. 585	44

NAME OF CASE CITED.	F.	WHERE REPORTED.	Page of Vol.
Foster and Lister, Re.		L. R. 6 Ch. D. 87	551
Foster v. Green		7 H. & N. 881	492
Fothergill's Case		L. R. 8 Ch. 270	394
Fouldes v. Willoughby		8 M. & W. 540	103
Fowkes v. Manchester, &c., Assurance Co.		3 B. & S. 917	31
Fox v. Rose		10 U. C. R. 16	424
Franklin Fire Ins. Co. v. Massey		33 Penn. 221	526
Frazee v. McFarland		43 U. C. R. 281	552
Freeman v. Lomas		9 Hare 109	17
Frend v. Dennett		4 C. B. N. S. 576	590
Frey v. Mutual Ins. Co. of Wellington ..		43 U. C. R. 102. . . 196, 201, 202, 214, 321, 322, 323,	325
Fricker v. Tomlinson		1 M. & G. 772	591

G.

Gainsford v. Griffith		1 Wms. Saund., ed. 1871, 83. . . 80,	604
Galsworthy v. Strutt		1 Ex. 659	603
Gardner v. Gardner		2 O. S. 520	74
Geddes et al., Re.		2 Ch. Chamb. 447	240
Geddes v. Toronto Street R. W. Co.		14 C. P. 513	336
General Estates Co., Re.		L. R. 3 Ch. 758	336, 338
George and Richard, The		L. R. 3 Ad. & Ec. 466	84
Geraldi v. Provincial Ins. Co.		29 C. P. 321	596
Gibbs v. Trustees of the Liverpool Docks.		1 H. & N. 439, 3 H. & N. 164	375
Gillespie v. British America Assurance Co.		7 U. C. R. 108	31
Goodhue, Re		19 Grant 366	267
Gordon v. Whieldon		12 Jur. 988, 11 Beav. 170	573
Gould v. Close		21 Grant 273	336
Gowland v. Garbutt		13 Grant 578	88, 89
Governors of the College of Christ, Brecknock and Martin, Re.		L. R. 3 Q. B. D. 16	348
Graham v. Meneilly		16 Grant 661	607
Gray v. Richford		1 App. 112	494
Great Western R. W. Co. v. McEwan ..		28 U. C. R. 528	543
Green v. Steer		1 Q. B. 707	398
Greenway, Ex parte		6 Ves. 811	581
Greer v. Johnston		40 U. C. R. 166	476
Griffith v. Brown		21 C. P. 12	109, 111
Grosvenor v. Atlantic Ins. Co.		17 N. Y. 608	525
Guardians of the Poor of the West Ham Union v. Ovens		L. R. 8 Ex. 37	590
Gugisburg v. Waterloo Ins. Co.		24 Grant 350	560
Gunn's Case		L. R. 3 Ch. 40	49, 52

H.

Halcrow v. Kelly		28 C. P. 551	143
Hall v. Hamilton		24 C. P. 302	368
Ham v. Lasher		24 U. C. R. 533, note	565
Hamilton v. Clarke		2 P. R. 189	342, 343
Hammersley v. Baron De Biel		12. Cl. & F. 45	532
Harrison v. Douglas		3 Ad. & E. 396	596
Harrison v. Preston		22 C. P. 576	17

NAME OF CASE CITED.	H. WHERE REPORTED.	Page of Vol.
Haskill v. Fraser.....	12 C. P. 383.....	572
Hawke v. Niagara District Mutual Ins. Co.	23 Grant 139.....	518, 520
Hayward v. Seaward.....	1 M. & Scott 459.....	104
Heald v. Carey.....	11 C. B. 977.....	103, 104
Heley v. Cousins.....	34 U. C. R. 63, 74, 5.....	476
Hemming v. Trenery.....	9 A. & E. 926.....	147
Hemmingway v. Hemmingway.....	11 U. C. R. 237.....	453
Henderson v. Brown.....	18 Grant 79.....	17, 88, 89
Hendrickson v. Queen Ins. Co.....	31 U. C. R. 547.....	518
Herbert v. Sayer.....	5 Q. B. 965.....	401, 402
Hercules Ins. Co., Re.....	19 Eq. 302.....	338
Heugh v. London and North Western R. W. Co.	L. R. 5 Ex. 51.....	103
Hewison v. Negus.....	16 Beav. 594, 17 Jur. 445, in app., 22 L. J. Ch. 655, 17 Jur. 567.....	551
Heyland v. Scott.....	19 C. P. 165.....	453
Heymann v. European Central R. W. Co.	L. R. 7 Eq. 154.....	45
Hibblewhite v. McMorris.....	6 M. & W. 200.....	70
Hicks v. Downing.....	1 Ld. Raym. 99, 1 Salk. 13.....	78
Hinton v. Sparkes.....	L. R. 3 C. P. 161.....	604
Hiort v. Bott.....	L. R. 9 Ex. 86.....	103
Hoar v. Clute.....	15 Johnson 224.....	501
Hobbs v. London and South Western R. W. Co.	L. R. 10 Q. B. 111.....	325
Hobday v. Peters.....	28 Beav. 354.....	607
Hodgins v. Corporation of Huron and Bruce.....	3 E. & A. 169.....	370, 375
Hodgson v. Hooper.....	4 E. & E. 149.....	462, 471
Hodgson v. Temple.....	5 Taunt. 181.....	479, 486
Hogan v. Morrissy.....	14 C. P. 441.....	73, 74
Holbrook v. American Ins. Co.....	1 Curtis C. C. 193.....	518
Holton v. Macdonald.....	12 C. P. 246.....	73
Hope v. Caldwell.....	21 C. P. 241.....	240
Hopkins v. Provincial Ins. Co.....	18 C. P. 74.....	417, 420
Hoskins, Re.....	1 App. 379.....	109, 111
Houck v. Town of Whitby.....	14 Grant 671.....	227
Houston v. Moore.....	5 Wheat. 1.....	266
Hughes v. Canada Permanent, &c., Society	39 U. C. R. 221.....	359
Humberstone v. Henderson.....	3 P. R. 40.....	341, 343, 344, 345, 346
Hunt v. Wimbledon Local Board.....	L. R. 3 C. P. D. 208.....	227
Hutchins v. Scott.....	2 M. & W. 809.....	509, 510
Hutchinson v. Collier.....	27 C. P. 249.....	404, 405

I.

Ilchester Case.....	1 Peck. 305.....	303
Imperial Land Co. of Marseilles.....	L. R. 11 Eq. 478.....	336, 337
Insurance Co. v. Colt.....	20 Wallace 560.....	202, 207
Ionides v. Universal Marine Ins. Co.....	14 C. B. N. S. 259.....	83
Isaac v. Andrews.....	28 C. P. 40.....	411, 412, 413

J.

Jackson v. Rose.....	2 Virg. Cas. 34.....	267
Jackson v. Hyde.....	28 U. C. R. 284.....	114, 118, 119, 121
Jacobs v. Equitable Ins. Co.....	18 U. C. R. 14, 373.....	521

NAME OF CASE CITED.	J. WHERE REPORTED.	Page of Vol.
Jameson v. Brick and Stone Co. (Limited)	Weekly Notes, December, 14, 1878, p. 233.	402 note.
Jeston v. Key	L. R. 6 Ch. 610	532
Jewell v. Parr	13 C. B. 909	119
Johnson v. Churchwardens of St. Peter's, Hereford	4 A. & E. 520	78, 79
Johnson v. Parke	12 C. P. 179	476
Johnson v. Provincial Ins. Co.	26 C. P. 113	324
Jolliffe v. Wallasey Local Board	L. R. 9 C. P. 62	370
Jones v. Cameron	16 C. P. 271	500
Jones v. Cowden	34 U. C. R. 345	532
Jones v. Provincial Ins. Co.	16 U. C. R. 477	200

K.

Kastner v. Winstanley	20 C. P. 101	361
Keffer v. Keffer	27 C. P. 257	453, 471, 473
Kelly v. Commonwealth Ins. Co. of Pennsylvania	10 Bos. 83	203
Kelly v. Isolated Risk Ins. Co.	26 C. P. 199	200, 202, 227
Kelly v. Macklem	14 Grant 29	407
Kempster v. Bank of Montreal	32 U. C. R. 87	31
Kenny v. Cook	4 U. C. R. 268	368
Kerr v. Hastings Mutual Ins. Co.	41 U. C. R. 217	501, 560
Kerr v. Stripp	40 U. C. R. 125	551
Kitchen v. Bartsch	7 East 53	398
King's Case	L. R. 2 Ch. 714, 719	390
Kling v. Dress	5 Rob. N. Y. 521	79
Kyle v. Buffalo and Lake Huron R.W. Co.	16 C. P. 76	239

L.

Laidlaw v. Provincial Ins. Co.	13 Grant 377	31, 313, 560
Lake Superior Navigation Co. v. Morrison	23 C. P. 217	44
Langton v. Hughes	1 M. & S. 592	479
Latham v. Spedding	16 Q. B. 440	342, 343, 344
Lawson v. Laidlaw	3 App. 77	549, 553, 556, 609
Leaf v. Tuton	10 M. & W. 393	591
Lee v. Lancashire and Yorkshire R. W. Co.	L. R. 6 Ch. 527	526
Leggett v. Mutual Ins. Co. of N. Y.	50 Barb. 616	166
Leprohon v. Corporation of Ottawa	2 App. 522	263, 266, 267
Levita's Case	L. R. 3 Ch. 36	44, 50
Lindley v. Lacey	17 C. B. N. S. 578	332
Linford v. Provincial Horse and Cattle Ins. Co. (Limited)	10 Jur. N. S. 1066	521
Liverpool Adelphi Loan Association v. Fairhurst et ux.	9 Ex. 422	607, 608
Locke v. Matthews	13 C. B. N. S. 753, 760	453, 462
London and Provincial Consolidated Coal Co., Re	L. R. 5 Ch. D. 525	43
London Dock Co. v. Sinnott	8 E. & B. 347	227
Loomis v. Ballard	7 U. C. R. 366	384
Lovell v. Accidental Death Ins. Co.	Post Magazine, vols. 35, 36, 37, pp. 252, 419, 59	228, 231
Lucas v. Tarleton	3 H. & N. 116	509

NAME OF CASE CITED.	L.	WHERE REPORTED.	Page of Vol.
Luce v. Izod	1	H. & N. 245.....	167
L'Union St. Jacques De Montreal v. Belisle		L. R. 6 P. C. 31.....	267
Lyons v. Globe Mutual Ins. Co.....	27	C. P. 568.....	9

M.

Maillard v. Duke of Argyle	6	M. & G. 40.....	506
Manley v. Insurance Co. of North America	1	Lansing 20.....	519
Mara v. Quin.....	6	T. R. 1.....	83
Marks v. Feldman	L. R. 4	Q. B. 481, L. R. 5 Q. B. 275.....	581
Marsden v. City and County Assurance Co	L. R. 1	C. P. 232.....	84
Martin v. Hunter.....	1	Wheat. 303.....	266
Martyn v. Williams.....	1	H. & N. 817.....	78
Mason v. Babington	17	C. P. 142.....	73
Mason v. Bickle	2	App. 291	542
Mason v. Bradley.....	11	M. & W. 590.....	148
Mason v. Scott.....	22	Grant 593.....	44
Master v. Miller	1	Sm. L. C., 7 ed., 871, 917	147, 148
Mattock, &c., Co., Re.....	29	L. T. N. S. 324.....	44
Mayhew v. Herrick	7	C. B. 227.....	424
Mayor, &c., of Montreal v. Drummond..	L. R. 1	App. 384	218
Mayor &c., of New York v. Bailey.....	2	Denio 433, 3 Hill 531.....	369, 375
Mein v. Short.....	9	C. P. 247.....	73, 74
Mennie v. Blake.....	6	E. & B. 842	544
Merritt v. Niagara Dist. Mutual Ins. Co..	18	U. C. R. 529.....	7, 26, 505
Metropolitan R. W. Co. v. Jackson	L. R. 3	App. 193.....	115, 119, 121
Michie v. Erie and Huron R. W. Co.....	26	C. P. 566	45
Miller, Re.	1	App. 393	552
Miller v. Pridden.....	3	Jur. N. S. 78.....	18
Miller v. Race.....	1	Sm. L. C., 7th ed., 526.....	336
Montreal Centre Election Case, Ryan v. Devlin	20	L. C. Jur. 77.....	270, 282, 295
Montreal Ins. Co. v. McGillivray	13	Moore P. C. 87 .. 200, 227, 324, 505	
Montreal West Election Case.....	19	L. C. Jur. 113.....	302, 303
Moore v. Connecticut Mutual Ins. Co..	41	U. C. R. 497.....	31, 560
Moore v. Corporation of Esquesing.....	21	C. P. 277.....	217
Moore v. Doherty	5	Ir. L. R. 449	454
Moore v. Hodson.....	11	C. P. 444	45
Morgan v. Pike.....	14	C. B. 473	575
Morgan v. Quesnel.....	26	U. C. R. 539.....	404
Morell v. Cowan.....	L. R. 6	Ch. D. 166, in app. L. R. 7 Ch. D. 151.....	551
Morris v. Miller	4	Burr. 2057.....	257
Morrison, Ex parte.....	12	W. R. 1093.....	492
Morse v. Apperley.....	6	M. & W. 145.....	344
Mott v. Mott.....	11	Barb. 127	166
Moyle and Corporation of Kingston, Re..	43	U. C. R. 307.....	349
Mulholland v. Conklin.....	22	C. P. 372.....	453
Muma v. Niagara Dist. Mutual Ins. Co..	22	U. C. R. 214.....	500
Munsen v. Hans.....	22	Grant 279.....	89
Murray v. Earl of Stair.....	2	B. & C. 82.....	70

Mc.

Macdougall v. Patterson.....	11	C. B. 755.....	343
McLaren, Re	1	App. 68.....	384

NAME OF CASE CITED.	Mc. WHERE REPORTED.	Page of Vol.
McArthur v. McArthur.....	14 U. C. R. 544.....	454
McBride v. Gore District Mutual Ins. Co.	20 U. C. R. 451.....	201
McCrea v. Waterloo County Mutual Ins. Co.	1 App. '218.....	518
McGregor v. Hume.....	28 U. C. R. 880.....	581
McKay v. Wood.....	7 M. & W. 430.....	398
McIver v. Denison.....	18 U. C. R. 619.....	553
McKenzie v. Kittridge.....	24 C. P. 145.....	60
McKim v. Voorhies.....	7 Cranch 278.....	267
McLean v. Lafayette Bank.....	3 McLean 185.....	267
McWhirter v. Thorne.....	19 C. P. 302.....	581

N.

Natal Investment Co., Re.....	L. R. 3 Ch. '355.....	336, 338
Naughton v. Ottawa Agricultural Ins. Co.	43 U. C. R. 121.....	313, 519, 559
Nesbitt v. Rishton.....	11 A. & E. 246.....	555
Nicholl v. Allen.....	1 B. & S. 934.....	555
Nicholls v. Great Western R. W. Co....	27 U. C. R. 382.....	228
Newman, Re.....	30 Beav. 196.....	240
Nordheimer v. Robinson.....	2 App. 305.....	542
Norwich Election Petition.....	19 L. T. N. S. 619.....	302

O.

O'Brien v. Credit Valley R. W. Co....	25 C. P. 275.....	360
Ontario and Quebec, Re.....	6 C. L. J. N. S. 212.....	267
Orr v. Orr.....	21 Grant 397.....	454

P.

Pagin & Gill's Case.....	L. R. 6 Ch. D. 681.....	390
Palmer v. Baker.....	22 C. P. 59.....	384
Palmer v. Hendry.....	27 Beav. 349.....	89
Park v. Phoenix Ins. Co.....	19 U. C. B. 110.....	31, 519, 560, 614
Parker v. Harcourt.....	5 Esp. 249.....	240
Parkinson v. Higgins.....	37 U. C. R. 308, 40 U. C. R. 274..	88
Parry v. Nicholson.....	13 M. & W. 778.....	148
Parsons v. Citizens' Ins. Co.....	43 U. C. R. 261.....	323
Parsons v. Queen Ins. Co.....	43 U. C. R. 271.....	324, 518, 520
Pasley v. Freeman.....	2 Sm. L. C., 7th ed., 64.....	492
Patterson v. Royal Ins. Co.....	14 Grant 169.....	526
Pattinson v. Luckley.....	L. R. 10 Ex. 330.....	143
Paton v. Currie.....	19 U. C. R. 388.....	240
Pearce v. Brooks.....	L. R. 1 Ex. 213.....	479, 483
Peck v. Gurney.....	L. R. 13 Eq. 79.....	44
Pellatt's Case.....	L. R. 2 Ch. 527, 46, 49, 52, 390, 391,	392
Penley v. Beacon Assurance Co.....	7 Grant 130.....	200
Pennsylvania and Ohio Canal Co. v. Gra- ham.....	63 Penn. 290.....	252
Perkins v. Washington Ins. Co.....	4 Cowen 645.....	202
Petrie v. Bury.....	3 B. & C. 353.....	572
Philps, Ex parte, In re Moore.....	L. R. 19 Eq. 256.....	384
Pidgeon v. Martin.....	25 C. P. 233.....	384
Piggott v. Birtles.....	1 M. & W. 441.....	510
Pigot's Case.....	11 Co. 27.....	147
Pince v. Beattie.....	11 W. R. 979.....	240

NAME OF CASE CITED.	P.	WHERE REPORTED.	Page of Vol.
Pitman v. Woodbury	3	Ex. 4.....	575
Pitt v. Chappelow	8	M. & W. 616.....	400, 401
Port Darlington Harbour Co. v. Squair..	18	U. C. R. 533.....	500
Port Dover and Lake Huron R. W. Co. v. Grey.....	36	U. C. R. 425.....	44
Port Whitby, &c., R. W. Co. v. Jones..	31	U. C. R. 170, 173.....	44
Portman v. Patterson.....	21	U. C. R. 237.....	343
Powell v. Divett	15	East 29.....	147
Powell v. Smith	L. R. 14	Eq. 85	526
Preston v. Hunton.....	37	U. C. R. 177.....	384
Proctor v. Gamble	17	U. C. R. 110.....	18
Proprietors, &c., of English and Foreign Credit Co. v. Arduin.....	L. R. 5	H. L. 64.....	188
Purser v. Bradburne	7	P. R. 18	341, 344
Pym v. Campbell.....	6	E. & B. 370.....	322

R.

Ralpho and West Hempfield Townships v. Moore.....	68	Penn. 404	252
Randall v. Morgan	12	Ves. 67	532
Rankin v. Hop and Malt Exchange Co..	20	L. T. N. S. 207.....	45
Rawson v. Samuel		Cr. & Ph. 161.....	17
Redford v. Mutual Ins. Co. of Clinton...	38	U. C. R. 538.....	501
Redpath's Case.....	L. R. 11	Ex. 86	52
Regina v. Baby.....	12	U. C. R. 346.....	258
Regina v. Bradshaw	38	U. C. R. 568.....	268
Regina v. Creamer	10	Lower Canada 404	257, 258
Regina v. Flaherty	2	C. & K. 782.....	257, 258, 259
Regina v. Justices of Shropshire	8	A. & E. 173.....	11
Regina v. Lawrence.....	43	U. C. R. 174.....	263
Regina v. McQuiggan.....	2	Lower Canada 340.....	257
Regina v. Newton	2	M. & Rob. 503	257, 259
Regina v. Savage.....	13	Cox C. C. 178.....	257
Regina v. Simmonsto.....	1	C. & K. 164	257, 259
Regina v. Taylor.....	36	U. C. R. 183.....	267
Reynolds v. Bridge.....	6	E. & B. 528	167, 603
Rhode Island v. Massachusetts.....	12	Peters 23.....	267
Riach v. Niagara District Mutual Ins. Co.	21	C. P. 464.....	31, 560, 561
Rice v. Provincial Ins. Co.....	7	C. P. 548.....	31
Richards v. Home Assurance Association.	L. R. 6	C. P. 591.....	44
Richardson v. Silvester	L. R. 9	Q. B. 34	492
Richmond Hill Hotel Co., Re	L. R. 2	Ch. 511.....	390
Ridgway v. Corporation of Toronto.....	28	C. P. 579.....	369, 374, 375
Ritchie v. Smith	6	C. B. 462.....	479, 486
Robson v. Warren	6	U. C. L. J. N. S. 14	384
Roe. dem. Fulham v. Wickett.....		Willes Rep. at p. 303	325
Rogers v. Hadley.....	2	H. & C. 227.....	332
Rooney v. Lyons.....	2	App. 53	384
Rumrell v. Henderson	22	C. P. 180.....	454
Rutherford v. Stovel	22	C. P. 9	167
Ruttan v. Short	12	U. C. R. 485.....	476

Sainter v. Ferguson	7	C. B. 716.....	166
Samo v. Gore District Mutual Ins. Co. ..	26	C. P. 405.....	31

S.	NAME OF CASE CITED.	WHERE REPORTED.	Page of Vol.
12	Sandford v. Mechanics' Mutual Ins. Co.	Cush. 541.	596
5	Scanlan v. Seals.	Ir. L. R. 154.	420
	Scanlon v. Union Fire Ins. Co. of Balti- more.	4 Bissell 511.	519
	Scarfe v. Morgan.	4 M. & W. 470.	104
	Scholey v. Central R. W. Co. of Venezuela.	L. R. 9 Eq. 266, note.	45
	Scott v. Mayor, &c., of Manchester.	2 H. & N. 204.	370
	Security Fire Ins. Co. v. Kentucky.	7 Bush. 81.	202
	Shannon v. Gore District Mutual Ins. Co.	37 U. C. R. 380, 2 App. 396.	31, 418, 500, 518
	Sharp v. Powell.	L. R. 7 C. P. 253.	84
	Shaw v. St. Lawrence County Mutual Ins. Co.	11 U. C. R. 73.	418
	Shier v. Shier.	22 C. P. 147.	167
	Siggers v. Evans.	1 Jur. N. S. 651, 5 E. & B. 367.	572
	Simpson's Case.	L. R. 4 Ch. 184.	46
	Skelton v. London and North Western R. W. Co.	L. R. 2 C. P. 630.	228
	Slavin and Corporation of Orillia.	36 U. C. R. 159.	267
	Sligo Election Case.	1 O. & H. 300.	302
	Slocombe v. Lyall.	6 Ex. 119.	344
	Sly v. Ottawa Agricultural Ins. Co.	29 C. P. 28.	323, 559
	Small v. Atwood.	6 Cl. & F. 232.	18
	Smith v. Commercial Union Ins. Co.	33 U. C. R. 63, 529.	398, 526
	Smith v. Hutchinson.	2 App. 405.	581
	Smith v. Mutual Ins. Co. of Clinton.	27 C. P. 441.	9
	Smith v. Stuart.	12 Grant 246.	572
	Snyder v. Snyder.	22 C. P. 361.	18
	South Australian Ins. Co. v. Randell.	L. R. 3 P. C. 101.	411, 412
	South of Ireland Colliery Co. v. Waddell.	L. R. 3 C. P. 463, L. R. 4 C. P. 617.	226, 360
	South Renfrew Election Petition.	10 C. L. J. N. S. 286.	302, 305, 307
	Spargo's Case.	L. R. 8 C. P. 407.	390, 392
	Sparrow v. Paris.	7 H. & N. 594.	605
	Standard Bank v. Johnson.	42 U. C. R. 16.	384
	Storms v. Canada Farmers' Mutual Ins. Co.	22 C. P. 75.	596
	Steel v. Smith.	1 B. & Al. 184.	592
	Stratford and Moreton R. W. Co. v. Stratton.	2 B. & Ad. 518.	11
	Swann v. Earl of Falmouth.	8 B. & C. 456.	509 510

T.

	Tarleton v. Allhusen.	2 A. & E. 32.	501
	Taylor v. Dunbar.	L. R. 4 C. P. 206.	84
	Taylor v. Needham.	2 Taunt. 278.	344
	Taylor v. Salmon.	4 Mylne & C. 134.	298
	Tear v. Freebody.	4 C. B. N. S. 228.	103
	Teasdale v. Braithwaite.	L. R. 4 Ch. D. 85.	551
	Thackeray v. Askin.	22 C. P. 164.	115, 118, 121
	Théberge v. Laundry.	L. R. 2 App. 102.	264
	Thibault v. Gibson.	12 M. & W. 88.	592
	Thompson v. Dickson.	28 C. P. 225.	552
	Thompson v. Frere.	10 East 418.	398
	Thompson v. Hudson.	L. R. 4, H. L. 1.	602
	Thurston and Corporation of Verulam.	25 C. P. 593.	217, 218

NAME OF CASE CITED.	T.	WHERE REPORTED	Page of Vol.
Timothy v. Farmer.....	7	C. B. 814.....	344
Tinniswood v. Pattison.....	3	C. B. 243.....	343, 344
Toronto Gas Co. v. Russell.....	6	U. C. R. 567.....	11
Trew v. Railway Passengers' Ins. Co....	6	H. & N. 839.....	233
Trotter v. Corporation of Toronto.....	28	C. P. 574.....	369
Trowell v. Shenton.....	L. R. 8	Ch. D. 318.....	532, 536
Truesdell v. Cook.....	18	Grant 532.....	454, 456
Trumpour v. Saylor.....	1	App. 100.....	368
Trust and Loan Co. v. Covert.....	1	Supreme Court Rep. 564.....	572
Tully v. Bradbury.....	18	Grant 561.....	89

U.

Ulrich v. National Ins. Co.....	42	U. C. R. 141.. 32, 196, 201, 202, 214, 267, 321, 322, 323, 325,	560
United Ports Co., Re, Adams' Case.....	L. R. 13	Eq. 474.....	44
United States v. Hudson.....	7	Cranch 32.....	266, 274
United States v. Lathrop.....	17	Johns. 4.....	266
United States v. Peters.....	5	Cranch 115.....	266
Universal Banking Co., Re, Rogers's Case.	L. R. 3	Ch. 633.....	44

V.

Vane v. Lord Barnard.....	Gilbert 6.....	18
Vaughan v. Vanderstegen.....	2	Drew 165, 363..... 607
Vicars v. Wilcocks.....	2	Sm. L. C., 7th ed., 534..... 83

W.

Wagner v. Jefferson.....	37	U. C. R. 551.....	610
Walker, Re.....	2	App. 265.....	384
Walker v. Hyman.....	1	App. 345.....	542, 545
Wallbridge v. Everitt.....	22	C. P. 28.....	79
Wallis v. Littell.....	11	C. B. N. S. 369.....	332
Walls's Case.....	L. R. 15	Eq. 18.....	44, 52
Ward v. Carttar.....	L. R. 1	Eq. 29.....	454
Ward, Lord, v. Lumley.....	5	H. & N. 87, 656.....	575
Warden v. Jones.....	2	DeG. & J. 76.....	532, 536
Warner v. Kline.....	17	C. P. 287.....	240
Watkins v. Nash.....	L. R. 20	Eq. 262.....	70
Watson v. Mason.....	22	Grant 574.....	602
Watson v. Midland Wales R. W. Co....	L. R., 2	C. P. 593.....	17
Wave, The.....	Blatch. & Howl.	235.....	266
Webb v. Commissioners of Herne Bay..	L. R. 5	Q. B. 642.....	340
Wetherbee v. Johnson.....	14	Mass. 412.....	266
White v. Agricultural Mutual Ins. Co..	22	C. P. 98.....	417
Whitlaw v. Phoenix Ins. Co.....	28	C. P. 53.....	31
Whitworth v. Smith.....	1	M. & Rob. 193.....	508
Widder v. Buffalo and Lake Huron R. W. Co.	24	U. C. R. 620.....	565
Williams v. McDonald.....	33	U. C. R. 433.....	454
Williams v. Davies.....	2	Sim. 461.....	17
Williamson v. Allison.....	2	East 446.....	492
Williamson v. Commercial Union Ass. Co.	25	C. P. 453, in appeal, 26 C. P. 591.....	31, 32, 560, 561

CASES CITED.

xxiii

NAME OF CASE CITED.	W. WHERE REPORTED.	Page of Vol.
Wilson v. Mayor, &c., of Halifax.....	L. R. 3 Ex. 114.....	370
Wing v. Harvey.....	5 DeG. McN. & G. 265.....	9
Winsmore v. Greenbank.....	Willes 577.....	297
Wood v. Nunn.....	5 Bing. 10.....	509, 510
Wood v. Priestner.....	L. R. 2 Ex. 66.....	361
Woodcock v. Bennet.....	1 Cowen 711.....	501
Workman v. Royal Ins. Co.....	16 Grant 185.....	227
Wright v. Corporation of Grey.....	12 C. P. 479.....	336
Wright v. Leonard et ux.....	11 C. B. N. S. 258.....	607, 608
Wrixon v. Vize.....	3 Dr. & War. 104.....	455
Wyld v. Liverpool, &c., Ins. Co.....	23 Grant 442.....	167

X.

Xenos v. Wickham.....	L. R. 2 H. L. 296.....	324
-----------------------	------------------------	-----

Y.

Yeomans and Corporation of Wellington.	43 U. C. R. 522.....	219 note.
Youghall Election Petition.....	21 L. T. N. S. 306.....	302, 303
Young v. Vickers.....	32 U. C. R. 385.....	492, 493
Younge v. Elliott.....	25 U. C. R. 330.....	453
Younge v. Matthews.....	L. R. 2 C. P. 129.....	411

REPORTS OF CASES
IN THE
COURT OF COMMON PLEAS.

EASTER TERM, 41 VICTORIA, 1878.

(May 20th to June 8th).

Present:

THE HON. JOHN HAWKINS HAGARTY, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J. (a)

LAW V. THE HAND-IN-HAND MUTUAL INSURANCE COMPANY.

*Mutual insurance—Subsequent erection of steam engine—Notice—Waiver—
Estoppel—36 Vic. ch. 44, O.*

In an action against defendants, a mutual insurance company, on a policy against fire, averring a total loss, the defendants set up that the plaintiff, without the defendants' knowledge or consent, had erected a steam engine on the insured premises, thereby increasing the risk, and rendering the insurance void under 36 Vic. ch. 44, O. It appeared that when the engine was erected the plaintiff notified the defendants thereof, and applied for additional insurance, but on being informed that he must pay an increased premium he refused to do so: that he never received any notice of his policy being cancelled, or of his requiring to have a new policy at the increased rate, but nothing further was done nor any objections made until a month after the fire, when the objections now relied upon were raised: that after such erection, when, by the terms of the policy, the renewal premium became due, the plaintiff received notice thereof from the defendants' agent, to whom the renewal receipt had been sent from the head office, requesting the plaintiff to pay the same, which he did, and was given the receipt, and there was the same notice and payment of the next renewal premium. The defendants alleged that these notices were sent and the renewal premiums received by mistake.

Held, that under these circumstances, the defendants could not set up that the policy had been avoided.

(a) GALT, J., in consequence of being engaged at the Assizes, was not present at the delivery of judgments on June 28th, and took no part therein.

DECLARATION on a fire policy, dated 13th July, 1874, for a year or during such further period or periods for which the plaintiff should from time to time have paid in advance the renewal premium or premiums required by the defendants, and for which the defendants should have issued a renewal receipt or receipts, on a rope walk built of wood, &c., \$1,500, subject to the Act of Incorporation, and to the conditions, &c., averring that the plaintiff paid in advance the renewal premiums, for which the defendants issued renewal receipts covering the period up to and subsequent to the loss, and averring loss to the amount insured, &c.

Pleas: 1. *Non est factum*.

2. That the defendants are a mutual company under 36 Vic. ch. 44, O., and that after the insurance, the plaintiff, without the defendants' knowledge or consent, and without giving notice to the defendants, made alterations in the house or building insured, erecting a steam engine therein, whereby greater risk and hazard from fire was incurred and the risk increased, by reason whereof, and under the statute, the insurance became void.

Issue.

Second replication: that the alterations did not increase the risk.

Third replication, on equitable grounds: that after the alterations and before loss, the plaintiff notified the defendants thereof, and their agent visited and inspected the alterations, and thereafter no additional premium was demanded by the defendants in respect thereof; but the defendants, after notice, when the next premium became due under the policy, demanded the same from the plaintiff, and the plaintiff paid the same to them, and they gave him the renewal receipt therefor; and again, when the next premium fell due, the defendants, with such full knowledge, demanded and the plaintiff paid to them the next renewal premium, and they gave him the renewal receipt therefor with such knowledge, wherefore they ought not to be allowed so to plead, and should be enjoined and prevented therefrom.

The defendants took issue on the replications.

They also rejoined on equitable grounds to the third replication: that after making the alterations, and after the policy became void, the plaintiff applied to insure the premises in their altered state, and the defendants offered so to do at an increase of $1\frac{1}{2}$ per cent. on the former rate, and on the 13th of January, 1876, wrote to the plaintiff to that effect, and enclosed him a blank form of application to be filled in, and to answer questions: and that the plaintiff never agreed thereto or returned the application, nor made any further application, and never paid the increased premium, and all negotiations ceased, and the defendants never renewed or revived, or intended to renew or revive the said insurance and never waived or intended to waive the statutable provisions; but in June, 1876, a notice that a renewal premium was due was by mistake sent to the plaintiff from the defendants' agent, and the plaintiff paid the same to the agent, who received the same by mistake, and without the defendants' knowledge or consent; and again in June, 1877, the same thing occurred under the same circumstances: that such payments were not the increased premiums required by the defendants for the insurance of the said premises in their altered state, as the plaintiff well knew, and before suit the defendants tendered back to the plaintiff said premiums and interest, &c.

Issue.

The cause was tried before Morrison, J., without a jury, at Kingston, at the Spring Assizes of 1878.

The fire took place on the 28th July, 1877, and there was a total loss.

In November, 1875, the steam engine was put in. The rope walk was much enlarged. The plaintiff went to the defendants' local agent, Gildersleeve, and told him of the alterations, and asked for a larger insurance. A clerk came and examined the premises.

On 13th January, 1876, the agent wrote to the plaintiff: "The company will take a risk on your rope walk in its present state at $4\frac{1}{2}$ per cent. This rate is $1\frac{1}{2}$ under rates

of other companies. I enclose a blank form of application. Please fill in the required amount of insurance. Answer the questions marked in pencil, and sign application, and return it to me and I will cover the risk at once."

The plaintiff said that on receipt of this letter he went to Gildersleeve and said the charge was too high. He said it was their charge. The plaintiff then said he would allow the insurance to remain as it was, and that he would not increase the amount: that he thought he left this, letter at the office, and did not notice the form enclosed and only read as far as the mention of the increased rate: that he did not consider the engine at all increased the risk, from its position: that he never made any application to any other company, and things remained as they were till the following June, when he received notice from the defendants that his policy was due on 25th June. He went to Gildersleeve and paid the premium and got the receipt produced. It was the usual printed form, referring to the original policy by number, &c.

"Received from Edward Law, of Kingston, the sum of \$37.50, being the amount of cash premium payable on renewal of Policy No. 781, from 25th June, 1876, to 25th June, 1877, at noon."

(Signed) "W. P. HOWLAND,
"President."

(Signed) "HUGH SCOTT,
"Manager & Sec."

Countersigned at Kingston, 25th June, 1876.

(Signed) "J. P. GILDERSLEEVE,
"Agent at Kingston."

Again, in June, 1877, a similar notice was received, and the plaintiff paid the renewal premium and obtained a receipt in exactly the same terms to insure from 25th June, 1877, to 25th June, 1878, signed and countersigned exactly as before.

About a month after this the fire occurred. The plaintiff stated that he never heard of anything being wrong till after the fire took place.

Gildersleeve proved that the plaintiff informed him of the steam engine, &c., and asked for \$1,200 additional insurance, and he told the plaintiff the rate would be higher. After examining the premises he wrote to the head office at Toronto, informing them of the change, and asking for a rate: that the plaintiff would like to have the present policy cancelled, and a new one issued for an increased amount to cover the building as it then stood. He enclosed a diagram.

On 12th January, 1876, he received an answer that the company would cover a line on the plaintiff's rope walk, (now that steam had been added) at 4½.

On the 13th January, he wrote to the plaintiff, as already stated. He said that the plaintiff came to him, and complained that the rate was too high, and would not go on: that in the following June a renewal receipt was sent down from the head office, and the plaintiff was notified as usual. The agent had dismissed the matter from his mind, and the renewal premium was received. He did not remember telling the plaintiff that his policy was cancelled. He remembered seeing him when he paid this renewal. This same thing occurred in June, 1877: that receiving the premiums was an oversight.

The defendants' manager said he had some recollection of fixing a rate: that he must have forgotten it: that sending the receipts was an oversight.

The plaintiff was recalled, and swore distinctly that he never was told his policy would be cancelled, or that the rate would be increased on the existing policy: that after the fire the Inspector told him to make out his papers, and his money would be paid in a few days.

It was objected that the policy became void under sec. 40, of 36 Vic. ch. 44, O., and that there was no estoppel.

For the plaintiff it was insisted that the risk was not in fact increased, and that the plaintiff never thought that his policy was not good.

The learned Judge found, that when the plaintiff notified the defendants of the alterations, and when he declined to make further assurance, he was not notified that

his then policy was cancelled or void, or that he would require a new policy at a higher rate: that he remained under the impression that his existing policy continued in force, and paid his premium in the years following under that impression and on the notices he received: that he acted *bona fide* throughout: that the defendants, by their conduct, led him to believe that the portion of premises originally insured, remained so insured under the policy: that no intimation to the contrary was given to the plaintiff till after the fire, and after inspection and proof papers sent in.

He entered a verdict for the plaintiff, with \$1,552.50 damages.

In this term, May 22, 1878, *Langton* obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a non-suit or verdict for the defendants; or for a new trial on the ground that the learned Judge should have found that the policy was void, and the plaintiff not entitled to recover thereon, the evidence having established that alteration had been made in the premises insured, whereby they were exposed to greater risk or hazard from fire than they were when the insurance was effected, and previous notice of such alteration was not given in writing to the defendants, and the requisite additional premium note after such alteration had not been paid to the directors, and on the law, evidence, and weight of evidence.

During the same term, June 4, 1878, *S. Richards*, Q. C., shewed cause. The finding of the learned Judge in this case is correct, and should not be interfered with. It is clear that the risk never was in fact increased, and defendants never notified the plaintiff that his policy was not a subsisting one. Under the circumstances of the case, the defendants are estopped from setting up the avoidance of the policy.

MacLennan, Q. C., contra. The evidence is clear that the premises were altered and the risk increased by the addition of the steam engine. Under 36 Vic. ch. 44, sec.

40, O., R. S. O. ch. 161, this avoided the policy. There is no estoppel or waiver here. The directors had no power to waive the forfeiture. The Legislature imposed on the directors the obligation to and only authorized them to issue policies on the adequate premium being paid. This is clearly the construction the Legislature have placed upon the Act, for by 40 Vic. ch. 8, sec. 61, O., express authority is given them to waive such forfeitures. Moreover, no equitable estoppel can arise. The plaintiff as an insurer in the company became a corporator or member of the corporation, and must be assumed to have knowledge of all its rules, and notice of the mistake in the acceptance of the renewal premiums: *Merritt v. Niagara District Mutual Insurance Co.*, 18 U. C. R. 529; *Bleakley v. Niagara District Mutual Insurance Co.*, 16 Grant 198, 201.

June 28, 1878. HAGARTY, C. J.—We are quite satisfied that the learned Judge found correctly on the facts appearing in evidence, and that unless some insuperable legal objections intervene, the plaintiff is entitled in justice and good faith to recover. The defendants are a mutual company.

Mr. Maclellan strongly urged that there could be no estoppel against the words of the statute, 36 Vic. ch. 44, sec. 40, R. S. O., ch. 161, p. 1455, providing that if any alteration be made in the premises insured, or if the risk be increased by any means whatever, whereby it is exposed to greater risk or hazard than when insurance effected, the insurance shall be void, unless previous notice be given in writing, and the requisite additional premium note or deposit, after such alterations, be given or paid to the directors; but no alterations or repairs, &c., not increasing such risk or hazard, shall affect the insurance previously made thereon.

40 Vic. ch. 8, sec. 61, O., declares that it shall be optional with the directors to pay or allow claims which are void under secs. 37, 38, 39 and 40 of the last Act, in case they think fit to waive the objections mentioned in said sections.

This is repeated as sec. 43 in R. S. O., ch. 161, p. 1455.

The policy declares this company to be incorporated under this Act, 36 Vic. ch. 44, O. (1873.)

Section 51 declares that any mutual company incorporated under that Act shall not issues policies otherwise than upon the mutual principle.

This section also appears as section 55 R. S. O. ch. 181, p. 1458.

Sec. 34 of 36 Vic. ch. 32, R. S. O. ch. 161, declares that any policy issued for a year or shorter period may be renewed at the discretion of the board by renewal receipts instead of a policy, &c.

We do not think that the argument should prevail, that because a statute makes a policy void in certain events, there can be no revival thereof by clear acts of the directors recognizing it as still existing, and dealing with the assured and allowing him to pay money or alter his position on the footing or assumption that he is still insured by them.

As far as injuries to parties are concerned, there is no reason why a mutual company should be exempt from ordinary rules of dealing, which bind stock companies and individual contractors.

Mr. Maclellan urged that the plaintiff being insured in a mutual company, became a member, and is bound to know its rules, &c.

It was urged that the plaintiff must have known of the requirement by the company of an increased rate, and that when he received the notice and paid the renewal, he knew well that a mistake had been made, and therefore cannot avail himself of it.

To this may be replied that he wholly repudiates any such idea, and that he always considered his old policy as subsisting and acted in good faith.

If he knew this in January, 1876, it is strange indeed that he should not have sought other insurance, and left a valuable property wholly uninsured for five or six months, till he received the notice in June.

We think, with the learned Judge, that he acted in good faith and on the full belief that his policy was in full force.

In this view, nothing can be more unjust in our view than to hold that the defence now urged should prevail, and that for eighteen months he should be allowed to believe himself insured, and to pay the defendants two annual premiums on such assumptions.

The head office sent down formal receipts, and the local agent countersigns them and hands them to the plaintiff, who pays his money on the faith thereof, his attention never being called to any doubt or suggestion against his insurance.

The defendants, as must be assumed, received the plaintiff's renewal premiums through their agent.

In *Smith v. Mutual Ins. Co., of Clinton*, 27 C. P. 441, 448, this Court distinctly held defendants open to an answer like that given in this case when they pleaded a statutable forfeiture.

Chatillon v. Canadian Mutual Ins. Co., Ib., 450, 459, is to the same effect.

Lyons v. Globe Mutual Ins Co., Ib., 567, 570, is to the same effect. The authorities are noticed there, and also in *Billington v. Provincial Ins. Co.*, 24 Grant 311, by Proudfoot, V. C. (a). See also *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant 418. The well known case of *Wing v. Harvey*, 5 DeG. McN. & G. 265, may be referred to.

We see nothing in the Statute law governing mutual companies to prevent them being bound by conduct such as here proved as amounting to an equitable estoppel.

GWYNNE, J., concurred.

Rule discharged.

(a) This case was reversed on Appeal, reported in 2 App. 158. It was subsequently taken to the Supreme Court and argued, and stands for judgment.

THE STADACONA FIRE AND LIFE INSURANCE COMPANY V.
MACKENZIE.*Calls on stock—Computation of time.*

Where calls on stock were to be made "at periods of not less than three months interval," and one call was made payable on the 10th of August and another on the 10th of November:

Held by the Court, affirming the judgment of GALT, J., that an interval of three months had not elapsed between the two calls, and that the second call was therefore bad.

THE declaration alleged that the defendant was indebted to the plaintiffs for three calls on fifty shares of the capital stock of the plaintiffs' company, held by defendant, payable respectively on the 1st of May, 10th of August, and 10th of November, 1877, with interest at the rate of seven per cent. from the said dates.

The defendant demurred to so much of the said declaration as alleged that the defendant was indebted to the plaintiffs in respect of the call of five per cent., payable on the 10th of November, 1877, on the grounds, that the period of three months did not elapse between the 10th of August and the 10th of November in the declaration mentioned; and that it was not shewn in the said declaration that the said call of five per cent. was due and payable.

On February 22, 1878, the demurrer was argued.

H. J. Scott, for the plaintiffs.

J. Crerar, for the defendant.

The argument was in substance the same as before the full Court.

March 5, 1878. GALT, J.—By sec. 3 of 37 Vic. ch. 94, D. the periods at which calls may be made are "not to exceed five per cent. per call, and at periods of not less than three months interval."

In this case the first call is payable on the 1st of May, 1877; the second on the 10th of August, and the third, which is the one complained of, on the 10th of November, 1877.

It appears to me when the second call was made the defendant had the whole of the 10th of August in which to pay it. If this be so, no other call could be made until the 11th of August, and therefore under the terms of the Act he should have had the whole of the 11th of November in which to pay it.

This demurrer is therefore allowed.

Judgment for defendant.

On May 28, 1878, the case was re-heard before the full Court.

H. J. Scott, for the plaintiffs. The whole question is, whether from the 10th of August to the 10th of November was a period of not less than three months interval, within the meaning of the statute. The construction to be placed on the words "not less than" is that the days on which the calls were to be made, were to be included in the computation, and therefore the call on the 10th November was good. If the words used had been "from" or "after," then it might be held that they were to be excluded: *Stratford and Moreton R. W. Co. v. Stratton*, 2 B. & Ad. 518; *Toronto Gas Co. v. Russell*, 6 U. C. R. 567.

J. Crerar, for the defendant. The whole question is thoroughly discussed in *Lindley on Partnership*, 4th ed., 630-1, where the cases are all collected. There it is said that where a certain term is required to elapse between the making of two successive calls, that time must be reckoned from the day on which the resolution for the first call is passed up to the day on which the resolution for the second call is passed; and if this period is too short, the call will be invalid; and if the time required to elapse between the calls is so many days at least, neither of the days on which calls are made ought to be included in the reckoning. The case of *Regina v. Justices of Shropshire*, 8 A. & E. 173, is also expressly in point. It is quite clear, therefore, that

an interval of three months has not elapsed, and therefore the last call cannot be supported.

May 28, 1878. HAGARTY, C. J.—We are of opinion that where the calls are to be made “at periods of not less than three months interval,” and one call is payable on the 10th of August, and another on the 10th of November, an interval of three months has not elapsed, and the latter call is bad.

It is unnecessary to do more than to refer to the summary of authorities in *Fisher's Digest*, “Time, Computation of,” p. 8321.

GWYNNE, J., concurred.

Judgment for defendant.

PARKINSON V. CLENDINNING.

Action for unpaid purchase money—Receipt under seal—Equitable right to recover—A. J. Act 1873, sec. 2—Agreement—Evidence.

In an action against the defendant for unpaid purchase money on the sale of land, the deed thereof, as well as the receipt endorsed thereon, acknowledged the payment; but in an equitable defence, as also at the trial, the defendant admitted the non-payment thereof, but claimed that he was not liable to pay it because the plaintiff had agreed at time of the sale, and on the faith of which agreement the defendant purchased, to pay off a prior incumbrance, and that a covenant to that effect had been omitted by mistake: that the same had not been paid off by the plaintiff, but had been paid by the defendant; and the defendant prayed that the deed might be reformed by the insertion in the deed of such covenant.

Held, that notwithstanding the receipt under seal, the Court could entertain the plaintiff's claim as an equitable demand under sec. 2 of the Administration of Justice Act of 1873; but that the evidence, set out below, failed to establish the agreement relied on.

THIS was an action brought by the plaintiff, William Parkinson, for money payable by the defendant to the plaintiff for a messuage and lands sold and conveyed by the plaintiff to the defendant.

The defendant pleaded never indebted, payment, and set-off.

He also pleaded a special equitable plea, to the effect that the plaintiff, and his brothers and sisters inherited from their mother certain lands subject to a mortgage executed by her in her life time: that the plaintiff and her brother Robert, being entitled to two-fifths in the said lands subject to the said incumbrance, agreed with the defendant for the sale to him of such two-fifths parts free and clear of the said incumbrance, and of all incumbrances, for the sum of \$2,200, of which the plaintiff was to receive \$1,000 only; and that the defendant, trusting and confiding in the said Robert Parkinson, who was a solicitor of this Court, and in the plaintiff, allowed Robert to prepare the deed or conveyance of the said two-fifths parts to the defendant, believing the same would be drawn according to the terms of the said agreement, then well known to the plaintiff, one of such terms being that the said plaintiff and the said Robert, or one of them, should pay off and discharge the

said mortgage, so that the said interest purchased by the defendant should be free and clear of all incumbrances; that in fraud of the defendant and contrary to the terms of the said agreement, a deed was drawn by the said Robert, and was executed by him and the plaintiff, for the said consideration of \$2,200, without any mention of the said mortgage, or any covenant to pay the same off, as it was well understood there should be: that the land so inherited from the plaintiff's mother was subsequently sold by the other heirs and the defendant, and the said mortgage paid off: that the plaintiff's brothers and sisters obtained only their shares of the purchase, less the proportion of the said mortgage chargeable to each, and that the plaintiff refuses to allow to the defendant the proportion of the mortgage chargeable to and paid by the defendant in respect of the plaintiff's one-fifth share. And the defendant prayed that the said deed might be reformed according to the terms of the agreement aforesaid, or that the plaintiff might be ordered to allow such sum as might be found according to the terms of the said agreement to be due to the defendant, and that the defendant might be allowed to set off the same against the claim of the plaintiff.

Issue was joined on these pleas.

The cause was tried before Armour, J., without a jury, at Toronto, at the Spring Assizes of 1878.

The circumstances of the case appeared to be as follows: Mrs. Parkinson, the plaintiff's mother, being seized in fee of certain land in the city of Toronto, and being applied to by her son Robert for a loan to him of \$2,000, she, to gratify him, agreed to raise the money by a mortgage upon her lands, her son Robert agreeing to indemnify her against that mortgage, and to pay the moneys to be thereby secured. Accordingly, by a mortgage, dated the 1st day of August, 1874, executed by Mrs. Parkinson and her husband in favour of the Building and Loan Association, she obtained the loan of \$2,000, which her son Robert received and applied to his own use; and by an instrument executed under his hand and seal, and dated 31st March 1875, Robert

covenanted with his mother to pay the moneys secured by the mortgage executed by Mrs. Parkinson in favour of the Building and Loan Association; and for better securing the fulfilment of that covenant he mortgaged to her the full sixty-four shares in the steamer *Bouquet*, of which he covenanted that he was the owner, and that he had power to mortgage the same, and that the same was free from incumbrances, save as appeared by the registry of the said ship.

Mrs. Parkinson died upon the 28th June, 1875, intestate, leaving three sons, the plaintiff, and Robert, and John, and two daughters, her sole heirs-at-law, her surviving.

In September or October 1875, letters of administration of Mrs. Parkinson's estate were granted to the defendant, who was an uncle of the plaintiff, his mother's brother, and who thereupon as administrator became possessed of the mortgage executed by Robert in favour of his mother upon the steamer *Bouquet*.

On the 10th day of October, 1876, Robert and the plaintiff executed a deed, expressed to be in consideration of \$2,200 therein acknowledged to be paid by the defendant to them, whereby they conveyed to the defendant in fee two one-fifth undivided parts in the lands and tenements whereon the mortgage in favour of the Building and Loan Association had been executed. This deed contained only limited covenants against the executor's own acts. Upon the deed there was a receipt for the whole \$2,200, signed by both Robert and the plaintiff.

At the time of the execution of this deed and of the agreement by the defendant for the purchase of the interest of Robert and John thereby conveyed, the defendant was in possession of the covenant of Robert and of the mortgage on the *Bouquet*, executed by him by way of indemnity against the mortgage on the land, and it was always expected both by defendant and all of Robert's brothers and sisters that Robert should and would pay off the mortgage to the Building and Loan Association as he had covenanted. This expectation was always entertained

until Robert absconded, as was said, in insolvent circumstances.

It did not appear that the defendant proved upon Robert's estate under his covenant to his mother, of whom the defendant was administrator. On the contrary, it did appear that the defendant paid to Robert's assignee in insolvency the amount of his half of the \$2,200 purchase money, which defendant agreed to pay for his and the plaintiff's two fifth parts of the land less one-fifth part of the amount due on the mortgage to the Building and Loan Association which Robert's assignee agreed should be applied towards payment of that mortgage.

The defendant swore that by his agreement he was to have the two-fifth parts free from the mortgage incumbrance. He said upon this point: "The plaintiff said his brother would pay it. I always expected he would. It was expected by the whole family that he would pay off this prior mortgage until he ran away. I was not to pay this \$1,100 until the mortgage was lifted."

The defendant further stated that in December, 1876, he had procured an assignment to himself of two prior mortgages which had been executed by Robert on the *Bouquet*, and that he, being then the holder of all the mortgages upon the steamer, chartered her for \$1,100 for the year 1877, and he still held her. What amount he paid to procure the assignment to himself of the prior mortgages did not appear. The defendant also gave evidence of divers sums by way of set-off, and also as payment upon account of the purchase money sued for.

The facts are further stated in the judgment.

The learned Judge allowed to the defendant the one-fifth part of the Building and Loan Association mortgage, and allowing it together with other sums admitted and proved, he rendered a verdict in favour of the defendant for \$140.

In this term, May 23, 1878, *T. H. Spencer* obtained a rule under the Law Reform Act to set aside the verdict for the

defendant, and to enter one for the plaintiff for such sum as upon the evidence to the Court should seem fit.

During the same term, June 4, 1878, *Beaty*, Q. C., shewed cause. The plaintiff cannot recover in this action. The acknowledgment of payment in the deed itself, as also in the receipt clause, estops the plaintiff from denying such payment: *Harrison v. Preston*, 22 C. P. 576. Even if, under the Administration of Justice Act there can be a recovery at law, there can be none on the present state of the pleadings, and no amendment should be allowed at this stage of the case. If the Court will permit an amendment to be made, then the defendant is entitled to succeed on his equitable defence, namely, that the plaintiff was to have the land freed from the mortgage in question, and the deed should be reformed by the insertion of a covenant to that effect. The evidence shews that the parties agreed that the assumption of the mortgage by the defendant was to be treated as a payment; at all events it would constitute a good equitable set-off: *Henderson v. Brown*, 18 Grant 79; *Williams v. Davies*, 2 Sim. 461; *Rawson v. Samuel*, Cr. & Ph. 161, 178; *Watson v. Mid Wales R. W. Co.* L. R. 2 C. P. 593; *Freeman v. Lomas*, 9 Hare 109, 114; *Snell's Equity*, 4th ed., 504.

T. H. Spencer, contra. Before the passing of the Administration of Justice Act of 1873, the plaintiff would have had no action at law, on the ground of estoppel, as laid down in *Harrison v. Preston*, 22 C. P. 576; but now, under sec. 2 of that Act, the claim being "purely a money demand," the action is maintainable. The money is recoverable under the common counts; at all events, an amendment should be allowed so as to enable the plaintiff to file an equitable claim. The defendant's equitable defence was not proved. There is no evidence of the agreement relied upon, but the land was sold for \$2,200 over and above the mortgage, and the defendant was to look to Robert to have the mortgage discharged. There is no evidence that the assumption of the mortgage should be deemed a payment of the purchase money; and this is not the subject of an equitable set-off.

The legal effect of the deed must govern. The cases shew that upon the execution of the deed, in the absence of fraud, or a covenant to pay off incumbrances the purchaser is not entitled out of the unpaid purchase money to pay off incumbrances: *Sugden* on V. & P., 14th ed., 549; *Dart* on V. & P., 5th ed., 804-5, 824-5; *Rawle* on Covenants for Title, 4th ed., 611, 634, 640, 643; *Small v. Atwood*, 6 Cl. & F. 232; *Miller v. Pridden*, 3 Jur. N. S. 78; *Snyder v. Snyder*, 22 C. P. 361; *Proctor v. Gamble*, 16 U. C. R. 110; *Vane v. Lord Barnard*, Gilbert 6.

June 28, 1878. GWYNNE, J.—It was at first objected that the plaintiff could not recover in this action as the deed under seal contained an acknowledgment of the payment of the purchase money sued for, and there was also a receipt signed by both grantors for the whole consideration money; but the defendant having by his plea placed upon the record admitted that the money was not paid, and asserting an equity against his being compelled to pay it, and admitting also in his evidence that the consideration was not paid except by the items for which he claims credit in this action as having been paid by him to and on account of the plaintiff since the execution by him of the deed to the defendant, we can entertain the plaintiff's claim as an equitable demand under the Administration of Justice Act.

The result as it appears to me is, that inasmuch as under these circumstances the acknowledgement of payment of the purchase money which is contained in the body of the deed, and also endorsed upon it, cannot estop the plaintiff's right to recover the purchase money which in truth was not paid, and inasmuch as the deed contains only a covenant against the grantor's own acts, the plaintiff is entitled to recover whatever sum remains unpaid, unless the defendant can establish the equity upon which he relies as a defence, and for reformation of the deed.

The defendant in his evidence says that the agreement by which he purchased was that he was to have these two-fifth parts, namely, the shares of Robert and the plaintiff, free

from the incumbrance of the mortgage to the Building and Loan Association. That may well be without the defendant being able to establish as against the plaintiff the equitable relief which he invokes, or any equitable defence against the plaintiff's claim. In his plea the defendant states the agreement to have been that the plaintiff and Robert, or *one* of them, should pay off and discharge the mortgage.

The defendant admits that he had in his possession at the time Robert's covenant of indemnity, and the collateral mortgage executed by him upon the *Bouquet*. And he moreover adds that both he and all the members of the family then, and until Robert ran away, expected that he would, as he should have, and as he had covenanted by a covenant then vested in the defendant, pay off that mortgage. At the time then of the conveyance to the defendant there was no reason whatever for the plaintiff assuming either jointly with Robert or severally to pay off that mortgage. He had a right to insist upon the defendant compelling Robert to fulfil his covenant, instead of himself becoming a surety with Robert for the payment of the mortgage, as the defendant now contends he had agreed to do.

If any covenant had been inserted in the deed of conveyance to the defendant, it ought in all justice to have been the covenant of Robert alone. Now the plaintiff denies, wholly upon his oath the defendant's statement that the conveyance of his one-fifth part was to be free from the incumbrance of the mortgage. The frame of the deed is consistent with the plaintiff's contention so far at least as the plaintiff is concerned, and I must say that in view of all the facts which are proved and admitted, it is consistent with what was just and proper, having regard to the plaintiff's rights and interest, to have been done.

Reformation or alteration of the deed in the manner asked by the defendant, would therefore be, as it appears to me, altogether at variance with equity and good conscience.

The defendant having Robert's covenant of indemnity, does not appear to have enforced it, as he should have done, against Robert's estate. Although he had a right to prove against that estate to the full amount of the mortgage held by the Building and Loan Association, he does not do so, but agrees with the assignee, as it would seem, that the latter should allow towards payment of that mortgage, although Robert was liable for the whole, one-fifth part of that liability out of the purchase money the defendant had agreed for with Robert for his one-fifth share. Having the mortgage as collateral security, he does not realize that security. There were, he says, two prior mortgages upon the steamer, but he says he has acquired them. What he paid to acquire these mortgages does not appear. Holding, as he did, the third mortgage as administrator of Mrs. Parkinson, he could only charge whatever he paid. Having acquired all the mortgages in himself, instead of realizing the charges he deals with the vessel, chartering her for the season, and receiving the charter money, and rests upon the assertion that in his judgment the *Bouquet* is not of value sufficient to pay the three mortgages. It may be, however, that if sold it would, with what the defendant had realized out of Robert's estate, pay what the defendant may have paid for the two prior mortgages and the third; but however that may be, it was his duty to realize the security, in order as far as possible thereout to pay the Building Association mortgage.

In view of the default committed by the defendant in realizing out of Robert's estate generally, and the *Bouquet* steamer in particular, the amount he had covenanted to pay to satisfy and discharge the above mortgage, it would, in my judgment, be inequitable in the extreme to countenance the demand which the defendant asserts against the plaintiff in respect of that mortgage. As to the covenant free from incumbrance having been omitted by mistake the plaintiff denies it upon oath, and I confess that I think the circumstances support his contention; and as to its having been omitted by any fraud

of the plaintiff, there seems no pretence for such a contention. If such a covenant had been inserted, unless it had been the covenant of Robert alone, the plaintiff would, I think, have had more reason to complain of the injustice of its insertion than the defendant has at its omission.

Allowing to the defendant the full amount paid by him for a judgment recovered by one Slavin against the plaintiff, which Mr. Beaty admitted upon the argument was all he claimed in respect of that item, and allowing to the defendant all the small items which the plaintiff contested except item No. 17, \$21, as to which I do not see any evidence, I find the defendant to be still indebted to the plaintiff in the sum of \$450, for balance of purchase money and for interest thereon since the date of the deed, amounting in the whole to \$497, for which sum the rule will be to enter a verdict for the plaintiff.

The verdict will be for the plaintiff, and \$497 damages.

HAGARTY, C. J., concurred.

Rule accordingly.

PARSONS V. THE VICTORIA MUTUAL FIRE INSURANCE
COMPANY.

Insurance—Further insurance—Estoppel.

The plaintiff who was insured with the defendants, a mutual insurance company, for \$2,000, and in other companies with their assent for \$8000 in all for \$10,000, on 4th July wrote to defendants notifying them of changes he had made in his policies with other companies, with a list of the companies he was then insured in, to which defendants' secretary on the 7th of July replied that no such notice was necessary so long as the total amount of the insurance was not increased. In June or July defendants' inspector notified the plaintiff that defendants intended reducing his insurance with them by \$1000, to which the plaintiff assented, informing them that he would replace the amount in some other company. On 16th July the insurance was reduced and the unearned premium returned by the local agent, S., with whom the plaintiff effected an insurance for the \$1000 in the Quebec Insurance Company, of which company S. was also agent.

Held, that under these circumstances the defendants could not set up that this was a further insurance without notice to them.

DECLARATION on a fire policy for a year from 8th August 1876, for \$2,000, afterwards reduced to \$1,000, averring loss by fire.

The common counts were added.

Pleas :

1. *Non est factum.*

2. Traverse of loss.

3. That the policy was subject to the statutory conditions and variations. Condition 8 set out that the defendants were not liable if there should be any subsequent insurance, unless and until the company assent thereto by writing, signed by the duly authorized agent; also a "variation" condition avoiding policy if any double insurance should subsist with plaintiff's knowledge, unless by consent of directors, signified by endorsement on the policy or otherwise acknowledged in writing by the secretary or other authorized officer. It then set out a subsequent insurance in the Quebec Insurance Company for \$1,000, negativing any assent thereto.

4. Setting out a further insurance of \$1,000 with the Canada Farmers' Mutual Company, without the defendants' assent.

5. Setting up fraud in the proofs of loss.

Issue.

The cause was tried before Patterson, J. A., and a jury, at Guelph, at the Spring Assizes, 1878.

The fire occurred on the 3rd August, 1877. The policy stated a further insurance of \$8,000.

It appeared that in June or July, 1877, the defendants' inspector told the plaintiff that they were carrying too much insurance in Orangeville, and must reduce the amount. To which the plaintiff assented. A letter was produced, dated 16th July, 1877, stating that the Board had reduced the plaintiff's policy to \$1,000, and that from that date he was to consider it so reduced. They refunded to him the unearned premium.

The plaintiff said that when the local agent refunded this, he applied to him to place him in the Quebec Insurance Company, which was accordingly done. He said he thought the reduction was in June, and he insured in the Quebec almost immediately; it might have been July.

In consequence of the failure or stoppage of two companies, he substituted two others.

On 2nd or 3rd August, he effected an insurance with the Queen's Insurance Company to take the place of an insurance in the Western, in which the premium had been returned to him on the 26th July.

On the 4th July, he sent to the defendants a notice respecting changes in his policies. He then stated that he had made some changes, and that he was then insured as follows:

Western	\$2,000
Lancashire	2,000
Standard, or some other.....	2,000
Phoenix	2,000
Victoria	2,000
	<hr/>
	\$10,000

On 7th July, he received a post card from their secretary acknowledging it, saying: "I have yours of 4th inst., with notice of changes in your insurances, although none in

amount, the total on stock being kept at \$10,000. We do not require notice of such changes, but only when you increase the amount. All changes of companies we consent to without notice, only we insist that all the policies cover concurrently, as if any of the policies are divided into several items, ours must also be divided up in same manner on the stock or cancelled. I presume all are alike."

The plaintiff urged that he did not, up to the fire, increase his insurance beyond \$10,000, the amount stated as existing when he insured with the defendants: that all he did was merely changing from one company to another, and that this letter from the defendants of July 7th, dispensed with any notice so long as the gross amount of insurance was not increased. The Western premium was returned to him on the 26th July, 1877, and he then insured with the Queen's.

The two subsequent insurances relied on in the pleas, were in the Canada Farmers' Insurance Company and the Quebec Insurance Company.

The Canada Farmers' policy was dated 22nd June, 1877, for \$900.

The one in the Quebec Insurance Company was for \$1,000, and was in June or July, after being notified by the defendants that they reduced their risk from \$2,000 to \$1,000. It was not clear whether it was before or after the defendants' letter of 16th July. It was probably after his letter to them of the 4th July, as neither the Quebec or the Canada Farmers was mentioned therein.

In his proof papers, the plaintiff stated the insurances at the time of the fire as follows :

Queen's Ins. Co	\$2,000
Lancashire	2,000
Standard.	2,000
Scottish Provincial	2,000
Quebec	1,000
	<hr/>
	\$9,000

He said, "The said property was insured for the sum of

\$8,000, as follows, (set out as above), in addition to the amount secured by the defendants' policy.

No mention appeared of the Canada Farmers' policy.

The plaintiff apparently treated this last insurance as on other property.

He said it was an insurance on tools and machines.

The defendants called no witnesses.

It was objected for the defendants, that these other insurances were not notified to the defendants.

For the plaintiff, it was urged that there was notice of all effected before the 4th July, 1877, and the secretary's letter was a consent to the further insurance without notice, so long as the amount was not increased beyond \$10,000, and there was not time to notify the Queen's Insurance Company, and the letter was a waiver of the condition in the policy.

The learned Judge entered a verdict for the plaintiff for \$1,030, with leave to the defendants to move on the objection.

In this term, May 23, 1878, *M. C. Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiff and to enter a nonsuit on the leave reserved.

During the same term, May 30th, 1878, *Osler* and *M. McCarthy* shewed cause. There was no forfeiture of the defendants' policy by reason of the subsequent insurances. There was clearly none as regards the Canada Farmers' insurance, as it was on different property, namely, on tools and machines. As regards the insurance in the Quebec company, there was sufficient notice. On the inspector informing the plaintiff that the company intended reducing their policy by \$1,000, the plaintiff notified him that he would replace the amount in another company, and on the receipt of the unearned premium from the local agent, the plaintiff effected the insurance with him in the Quebec company, of which he was also agent. The letter of the 7th July estops the defendants from setting up any forfeiture, or would constitute a waiver thereof: *Benson v.*

Ottawa Agricultural Ins. Co., 42 U. C. R. 282; *Billington v. Canadian Mutual Ins. Co.*, 39 U. C. R. 433.

M. C. Cameron, Q. C., contra. Secs. 39 and 40 of the Mutual Ins. Co. Act, R. S. O. ch. 161, as well as the conditions of the policy, make it essential that notice must be given to the company of any further or additional insurance; and there was no sufficient notice here. The letter of the 7th July, written by the defendants' secretary, cannot create an estoppel or waiver as is contended by the plaintiff. The Canada Farmers' insurance was in fact on the same property; and therefore it, equally with the one in the Quebec Insurance Company, avoided the policy: *Merritt v. Niagara District Mutual Ins. Co.*, 18 U. C. R. 529; *Davis v. Canada Farmers' Mutual Ins. Co.*, 39 U. C. R. 452.

June 28th, 1878. HAGARTY, C. J.—No policy was put in evidence, and we have to take the state of the insurances from what the plaintiff stated at the trial.

There is, therefore, no evidence that the Canada Farmers' policy covered any portion of this property.

As to the insurance with the Queen's for \$2,000, he states that it was taken merely in substitution for the Western policy, which was cancelled on the 26th July, and that by the terms of the letter of the defendants of July 7th, they did not require notice where it was only a change from one company to another, and no increase in amount.

As to the \$1,000 in the Quebec company, this was merely to replace the \$1,000 struck off by these defendants from their original \$2,000 insurance.

We read the notice as to this reduction given by the defendants merely as a lessening of their own liability, and not as an objection to the amount at which the defendants held his property for insurance, viz., \$10,000.

The plaintiff also states that when defendants' inspector told him they intended to reduce his insurance by \$1,000, he said "Let me know and I will place it in some other

company"; and when their local agent, Shaw, handed to him the unearned premium of insurance, the plaintiff applied to him, and he effected the insurance with the Quebec company.

Therefore, in that view, they gave him to understand that in shifting the \$1,000 declined by them into the Quebec company, he was not called upon to give notice.

The defendants accept his statement of all that occurred, and rest their defence simply on the want of notice of these two insurances.

We think he has offered a satisfactory answer in their secretary's letter of July 7th, giving their interpretation of the contract as to notice.

We think the rule should be discharged.

No question was raised as to the state of the pleadings.

GWYNNE, J., concurred.

Rule discharged.

SLY v. THE OTTAWA AGRICULTURAL INSURANCE COMPANY.

Insurance—Variations of conditions not complying with statute—Value and age of building—Warranty—Reasonable conditions—Arbitration.

Action on a policy of insurance for \$600, on a wooden building, alleging a total loss by fire. The policy contained the statutable conditions, and also what purported to be variations thereof, by which the insured was stated to warrant the truth of the statements as to the age and value of the building. The variations had not the notices required by the statute to be prefixed thereto, but all the conditions and variations were set out in the declaration as part of the contract. The plaintiff in his application and proof papers stated that the building was worth \$900 and its age 10 years, while the jury found such value and age to be \$300 and 19 years, respectively, but that the misrepresentations were not wilfully made. The defendants set up the breach of warranty and also fraudulent misrepresentation as to such value and age; and also that by one of the statutory conditions the value must be ascertained by arbitration.

Held, that the question of warranty did not arise, for no effect could be given to the variations, as they did not comply with the statute; and that the plaintiff should not be deprived of his objection thereto taken at Nisi Prius and in term, even though their appearance in the record was his own fault.

Quære, whether the conditions making the questions of value and age the subjects of warranty were not unreasonable.

The Court set the verdict aside, with liberty to the defendants to have a new trial if they desired to try the question of fraudulent misrepresentation with a view of avoiding the contract; but if they abandoned all defences but that of value, then there was to be an order of reference as required by the conditions.

ACTION on a policy of insurance for \$600 on a wooden building, averring a total loss by fire.

The defendants pleaded *non est factum*, and other pleas.

The fourth plea set out the first of the statutory conditions, and also the third condition of the "variations," which was to the effect that all statements contained in the application are to be taken and deemed to be warranted on the part of the assured, * * and if any misrepresentation or concealment of fact be made in the application * * the policy shall be void. And again, that by the fourth condition of the variations, the company were only to be liable for two-thirds of the value of the building at the time of loss. The plea then stated the answer that the building had only been built ten years, and that it was worth in cash value \$900, whereas it had been built

eighteen years and was only worth \$200, whereby the policy was void.

There was also a plea of false and fraudulent representation in proof of loss with intent to defraud, that the building was worth \$900 when it was only worth \$200.

The cause was tried before Morrison, J.A., and a jury, at Brockville, at the Spring Assizes of 1878.

It appeared that the plaintiff in his application stated the estimated cash value to be \$900. In answer to the question, "When built"? he answered "Ten years old."

The policy contained the "statutable conditions." Immediately after came the heading "variations in conditions," but without the notices required by the statute, R. S. O. ch. 162, p. 1464, as to the policy being issued on the statutory conditions with the following variations, &c., and the notice that the variations are under the Ontario Act in force so far as the Court or Judge may hold them reasonable, &c.

Then sec. 5 declared that "No such variation, addition, or omission shall, unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, be legal and binding on the insured. * * And the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions, or omissions, are distinctly indicated and set forth in manner or to the effect aforesaid."

All these conditions, both statutory and variations, were set forth in the declaration as contained in the policy, and without any objection thereto.

At the trial the evidence was very clear that the building was overvalued three-fold. The jury found that the value was only \$300, and that its age was nineteen years or more.

It was objected for the defendants that there was a breach of warranty, both as to cash value and age of the building.

It was also argued that by one of the conditions the amount of the loss must be ascertained by arbitration.

For the plaintiff it was urged that this only arose on the "variations," and as they were not properly headed as

required by the statute, they must not be considered as in the policy.

The learned Judge put the following questions to the jury:

1. Did the plaintiff misrepresent the value of his house in stating its value at \$900 in his application?

2. Did the plaintiff misrepresent his loss in his proof papers in stating it at \$900?

To each of these questions the jury answered "Not wilfully."

3. What amount of damage did the plaintiff sustain by the fire? Ans. \$300.

4. Was the building over ten years old? Ans. Eighteen years.

A verdict was entered for the plaintiff for \$300, leave being reserved to the defendants to move to enter a verdict for them.

In this term, May 22, 1878, *J. K. Kerr*, Q. C., obtained a rule *nisi* on the leave reserved; and on the ground that the value of the loss and the proportion payable by the defendants was not ascertained by arbitration according to the policy; and to add pleas to raise such matter; and that the plaintiff was only insured to \$200, or two-thirds of the value.

During the same term, June 7, 1878, *E. H. Smythe* (of Kingston), shewed cause. The question here arises on the fourth plea, namely, whether the answer to the question of value of the building was a warranty under the variations of the statutory conditions. The variations, however, cannot be set up, not having the necessary headings and conclusions as required by the statute; and the fact of their being set out in the declaration does not prevent their being subsequently objected to: *Kempster v. Bank of Montreal*, 32 U. C. R. 87. Even if the statute be held to be complied with, under the statute the variations must be reasonable. The question of value is a matter of opinion and not of warranty; and therefore the variations must be held

to be unreasonable: *Riach v. Niagara District Mutual Ins. Co.*, 21 C.P. 464; *Williamson v. Commercial Union Assurance Co.*, 25 C. P. 453, in appeal, 26 C. P. 591. There was no misrepresentation as to value, as the jury have found that the representation was not wilfully made. The condition as to arbitration is not a condition precedent to the right of action; at all events, there is no plea on the record setting this up, and the Court will not allow such plea to be now added: *Dickson v. Equitable Ins. Co.*, 18 U. C. R. 286; *Laidlaw v. Liverpool, &c., Ins. Co.*, 13 Grant 377; *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant 418, 424; *Gillespie v. British America Assurance Co.*, 7 U. C. R. 108, 119; *Shannon v. Gore District Mutual Ins. Co.*, 37 U. C. R. 380, 385; *Clarke on Insurance*, 19, 185; *Fowkes v. Manchester, &c., Assurance Co.*, 3 B. & S. 917; *Rice v. Provincial Ins. Co.*, 7 C. P. 548; *Park v. Phoenix Ins. Co.*, 19 U. C. R. 110.

J. K. Kerr, Q.C., contra. This is just one of the cases which provoke litigation. The building is valued at \$900, and a policy issued on the faith thereof for \$600, whereas it is proved to be worth only \$300. Under the variations of the statutory conditions the answer to the question of value is a warranty. It is therefore necessary that the answer should be absolutely true, and immaterial whether the untruth be wilful or not. There is nothing unreasonable in this being a warranty, as it is very essential that the defendants should know the value of the building they are insuring, and that the insured should be bound by his statement as to value; *Moore v. Connecticut Mutual Ins. Co.*, 41 U. C. R. 497; *Samo v. Gore District Mutual Ins. Co.*, 26 C.P. 405; *Whitlaw v. Phoenix Ins. Co.*, 28 C.P. 53. The variations of the statutory conditions sufficiently comply with the statute; at all events the plaintiff cannot set this up, as he has set out the variations in his declaration as part of his contract. There was, moreover, misrepresentation. The question is, whether the value placed upon the building was such a value as a person would reasonably and fairly have placed upon it; and a valuation of \$900

when the value is proved to be \$300, cannot be said to be such a valuation. The condition requiring the value to be ascertained by arbitration is a condition precedent to the right of action, and therefore no action will lie until such value is first found thereby; at all events the Court should now refer it. In *Ulrich v. National Ins. Co.*, 42 U. C. R. 141, the Court said that a reference would have been granted if it had been asked at the trial, which was done in this case.

June 28, 1878. HAGARTY, C. J.—In no aspect of the case can the verdict be allowed to stand.

As to the alleged warranty. That can only arise on the “variations,” as though the plea raises the defence as well on them as on the statutory conditions, yet we are bound to hold that the objection is not open on the latter.

The law is fully discussed and settled in *Williamson v. Commercial Union Assurance Co.*, in appeal, 26 C. P. 591.

We think we must hold that the statute is imperative in its requirements as to these “variations,” and that the absence of the headings which are designed to call especial attention to the statute and to the necessity for the “variation” being reasonable, &c., in effect removes them from the policy.

But the plaintiff here in his declaration sets the policy out as containing these variations, and accepts an issue specially founded on them.

It was therefore his own fault that they appeared on the record.

We are, however, unwilling to deprive him of the statutory objection, as he took it at *Nisi Prius*, and as we are most reluctant to be forced into a discussion as to whether there was an absolute and unqualified warranty of such a matter as “estimated cash value,” or age of building.

There might perhaps be some difficulty in holding that a condition making such matters the subject of absolute warranty was reasonable.

We think there must be a new trial, and without costs.

It is difficult to understand such a verdict, or how a statement of \$900 as a fair value of a building found by the jury as only worth \$300, or one-third of the estimate, could have been made in good faith or not wilfully erroneous.

It should be considered by any jury that to obtain an insurance of \$600 on property only worth \$300 is utterly unfair to the underwriters.

It is forcing them into a contract into which they would never have knowingly entered.

It is impossible to avoid the conviction that companies bring difficulties of this character upon themselves by the extraordinary manner in which their agents accept risks on property inspected by them, the amount insured, as here, being double the actual value.

If the defendants wish to try the question of fraudulent representation with a view to avoid the contract altogether, they may have a new trial, without costs.

If they desire to abandon all defence but the amount of value, they may have such value ascertained by arbitration, as provided by the statutory conditions.

In neither case shall either party have the costs at Nisi Prius or in term.

GWYNNE, J., concurred.

Rule accordingly.

NEWMAN V. GINTY—NASMITH V. GINTY—DENISON V.
GINTY.

R. W. Co.—Action by creditor against shareholders—Proof of defendant being a shareholder—Allotment—Parol evidence—Powers of provisional directors.

In an action against defendant as a shareholder of forty shares for unpaid stock in a R. W. Co. it appeared that the defendant signed the stock book, which was headed with an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," they covenanted to pay the company ten per cent. of the amount of said shares and all future calls. The company subsequently passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificates, the one for the defendant representing that the company "in accordance with your application for forty shares," &c., "have allotted to you shares amounting to \$4000." The certificates were handed to the company's brokers to deliver to the shareholders. The company published a notice in a daily paper that these certificates were lying at their brokers, who were authorized to receive the ten per cent. The defendant went to the brokers and paid them ten per cent. upon the forty shares; and his name was thereupon entered upon the books of the company as the owner of forty shares, with a credit of ten per cent. as paid thereon, and he attended the first meeting of shareholders for the election of directors and seconded a resolution, which was carried, for the payment of the provisional directors for their services.

The defendant set up also that he was not a shareholder, because he signed the stock list on the faith of a parol agreement made with one of the provisional directors of the company, that unless he obtained a contract from the company he was not to become a shareholder, but the evidence shewed, not that the parol agreement made the obtaining of the contract a condition precedent to his becoming a shareholder, but that defendant's intention and agreement was to become a shareholder forthwith on allotment, and the parol agreement was merely a collateral one, as to the effect of his status as a shareholder on his obtaining a contract at a future day.

Held, that the defendant was a shareholder, and liable to the plaintiffs under sec. 80 of the Railway Act, C. S. C. ch. 66: that the agreement formed no defence; and that being made with a provisional director it would not bind the company.

NASMITH V. MANNING.

This case differed from the above cases, in this, that the defendant never paid the ten per cent, and never called for or received any certificate of allotment for the fifty shares for which he subscribed, and he stated that he never had any notice of the allotment having been made to him.

The Court granted a new trial to enable it to be expressly found as a fact whether the defendant had received any sufficient notice of the company having accepted him as a shareholder, according to his subscription.

THESE were actions in the nature of *scire facias*, at the suit of judgment creditors of the Toronto, Grey and

Bruce Railway Company, to obtain satisfaction of their judgments, *pro tanto*, out of unpaid stock, of which it was alleged the defendant was the holder in the above company.

The defendant pleaded similar pleas to each of the actions, in short substance as follows :

1. That he was not a holder of shares in the company.

2. That he was induced to become the holder of the shares by the fraud of the company, and that before the debt or liability was incurred in respect of which the plaintiff recovered judgment against the company, the defendant for such fraud repudiated and disclaimed the shares, and gave notice thereof to the company.

3. That he was induced to become holder of the shares by the fraud of the company and of the plaintiff; and that for such fraud he repudiated and disclaimed the shares (as in the second plea), and that the plaintiff is colluding with the company to defraud the defendant by instituting these proceedings.

4. That at the time the plaintiff issued execution upon his judgment against the company, the latter had sufficient goods, &c., out of which the execution could and would have been satisfied, but for the fraud and collusion of the plaintiff and the company, whereby the sheriff having the execution was induced falsely to return thereon *nulla bona*.

5. That it was agreed between the defendant and the company, that if the defendant would sign an agreement to take the shares the company would give to the defendant and one Alexander Manning a certain contract for the construction of the railway of the company; and that unless and until the said contract should be so given, the defendant should not be in any wise bound by his signing the said agreement to take the shares, or be or become a shareholder in the capital stock of the company; and that in pursuance of and in reliance upon the said agreement of the said company, the defendant did sign the agreement to take the shares; and that without any default of the

defendant, and although he requested the company to give the said contract to him and the said Manning, they refused so to do, and gave the contract to another; and, save as aforesaid, the defendant says that he never did subscribe for or become the owner of shares in the said company.

6. This plea only differed from the fifth, in this, that in the sixth plea the words, "subscribe for" shares were substituted for "sign an agreement to take," and the words, "bound by such subscription," for "bound by his so signing the said agreement."

Upon these pleas issue was joined.

The respective causes came down for trial before Armour, J., without a jury, at Toronto, at the Spring Assizes of 1878.

At the trial, the plaintiff proved that upon the 14th of May, 1869, the defendant, Ginty, signed and sealed the agreement following, which was written in a book opened by the railway company in April, 1869, as and called the "Stock Book":

"We, the several persons, firms, and corporations whose names and seals are hereunto subscribed, severally and respectively agree to and with the Toronto, Grey and Bruce Railway Company, and *bind ourselves*, our executors and administrators or successors, respectively, to become holders of the capital stock of the Toronto, Grey and Bruce Railway Company for the number of shares of one hundred dollars each and amounts set opposite to our respective names; and upon the allotment by the said company of my or our said respective shares, we severally and respectively agree to pay to the said company ten per centum of the amount of the said shares respectively, and to pay all future calls that may be made upon the said shares respectively: provided always, that no call shall be made until sixty days shall have elapsed from the time that a previous call was made payable, and no call shall exceed ten per centum of the amount subscribed.

1869.	Name.	No. of Shares.	Amount.	Seal.	Residence	Amt. Pd.	Witness.
May 14th.	John Ginty.	40	\$4,000.00	Seal.	Toronto.		N. Barnhart.

At the time of the defendant so subscribing his name in the stock book of the company, it appeared that the company was only provisionally formed and was still under the control of a board of provisional directors named in the Act incorporating the company, which provisional directors were, by clause 7 of the Act of Incorporation, 31 Vic. ch. 40, O., empowered "to open stock books, to make calls upon the shares subscribed therein, to call a meeting of the subscribers thereto for the election of other directors, as hereinafter provided, and with all such other powers as under the Railway Act are vested in such boards."

By the 14th sec. of the Act of Incorporation, it is enacted that: "As soon as shares to the amount of three hundred thousand dollars of the capital stock of the said company, other than by municipalities, shall have been subscribed, and ten per cent thereof paid into some chartered bank having an office in the city of Toronto (which shall on no account be withdrawn therefrom unless for the service of the company), the directors shall call a general meeting of the subscribers to the said capital who shall have so paid up ten per cent. thereof, for the purpose of electing directors of the company."

By the 16th sec. it is enacted that, "Notice of the time and place of holding such general meeting shall be given by publication in the *Ontario Gazette*, and in one newspaper in the city of Toronto, and in other newspapers in the counties," &c.

And by sec. 17, that, "At such general meeting the subscribers for the capital stock assembled, who shall have so paid up ten per cent. thereof, with such proxies as may be present, shall choose nine persons to be the directors of the said company, and may also make or pass such rules and regulations and by-laws as may be deemed expedient."

A stock ledger book was opened by the company, in which was opened an account with each person who had subscribed to the above agreement in the stock books, and with Ginty among the rest, debiting each with the amount set opposite his name in such agreement, and crediting each

with the amounts from time to time paid in respect thereof.

The minutes of the board of provisional directors was produced, which contained the following minute of the proceedings of a meeting of the directors, held on the 1st of July, 1869, namely :

“The president stated that on the previous evening the amount of stock required by the charter, before organizing the company viz., \$300,000, had all been subscribed, and that therefore it was necessary at once to devise means to collect and pay into the bank the first instalment of ten per cent. on the shares, so that the meeting for the election of directors and organizing the company could be called at as early a date as possible.”

The brokers, Messrs. Campbell & Cassels, were instructed at once to collect the first instalment of ten per cent. on the stock, and to have the amount required by law viz., \$30,000, paid into the bank to the credit of the company before Saturday, the 10th July, so as to enable an advertisement calling the general meeting of the shareholders to appear in the *Ontario Gazette* of that date. The secretary was also instructed to prepare advertisements for the *Ontario* and *Dominion Gazettes*, and such other papers as were necessary, calling the meeting, the date of which was left to be decided by the solicitor. The secretary was also instructed to issue allotment certificates to each shareholder for the amount of shares held by him.

The allotment certificates here referred to were placed in the hands of Messrs. Campbell & Cassels, brokers of the company, for the purpose of their receiving the ten per cent. thereon, and thereupon handing to the party so paying the certificate, with a receipt printed thereon and signed by the brokers.

Such certificates were printed, and in the form following :

“TORONTO, 1st July, 1869.

“To John Ginty, Esq., Toronto.

“This is to certify that the Toronto, Grey and Bruce Railway Company, in accordance with your application for-

forty shares, of \$100 each, of their capital stock, have allotted to you forty shares, amounting to \$4,000, the first instalment of ten per cent. thereon being payable forthwith, and all future calls to be made at a rate not exceeding ten per cent. on the amount of the said shares, and at intervals of not less than sixty days.

(Signed) "W. SUTHERLAND TAYLOR,
"Secretary."

The printed receipt on the back was in the form following, to be signed by the brokers:—

"\$—— Received from the within named the sum of —— dollars, being amount of first instalment of ten per cent. on the amount of stock allotted by the within certificate."

On the 2nd of July, and until the 9th, the company caused the following notice to be published in the *Toronto Globe*:—

"TORONTO, GREY AND BRUCE RAILWAY.

"NOTICE.

"Subscribers to the capital stock of the Toronto, Grey and Bruce Railway Company are hereby notified that the first call of ten per cent. on the stock is required to be paid immediately to the brokers of the company, Messrs. Campbell & Cassels, 60 King street east.

"By order.

(Signed) "W. SUTHERLAND TAYLOR,
"Secretary."

The defendant admitted that he did pay to Mr. Campbell, of the above firm, the sum of \$400, as and for the ten per cent. upon the \$4,000 so, as aforesaid agreed to be taken by him upon the 14th of May, 1869, in the stock of the company; and it also appeared that he got credit for such payment in the books of the company as a payment upon stock.

A meeting, for the purpose of electing directors under the provisions of the Act of Incorporation, and in pursuance of the direction involved in the above extract from

the minutes of the board of the 1st of July, 1869, was called for and held upon the 10th of August, 1869. The defendant attended and voted at this meeting as a stockholder, and he seconded a resolution which was in the terms following, and was resolved unanimously, viz. :—

“That the directors this day elected be instructed to pay an amount not exceeding four dollars per meeting to the provisional directors for each meeting which they have severally attended.”

It appeared that the defendant's name was entered, as a holder of \$4,000 stock on which ten per cent. was paid, in the book required to be kept by sec. 112 of the Railway Act, ch. 66 of C. S. C., which was incorporated with and made part of the Act of Incorporation.

The defendant having been sworn as a witness on his own behalf, stated that Mr. Laidlaw, one of the provisional directors, (there were by the Act twenty-one in all,) and the chief promoter of the company, frequently applied to the defendant to get him to take stock in the company, and that he had refused: that two or three days before the defendant signed the stock book, which he did upon the 14th of May, 1869, Laidlaw met the defendant and his partner, one Alexander Manning, on the street at defendant's place—the defendant and Manning were in partnership as contractors for public works, under the name of Ginty & Co.: that Laidlaw then came up to the defendant and Manning, and insisted upon their both taking stock. The defendant said that he again refused, and that thereupon Laidlaw said, “Well, if you will take stock, you shall have the contract; and if not, you will not have stock,” and, defendant said, with that understanding he and Manning consented to take stock, and two or three days after defendant signed the agreement in the stock book.

Mr. *Manning* being called said that Mr. Laidlaw had started the project of building the road: that he (Manning) had taken a part in assisting by going into the country to solicit bonuses for the road: that after this

Laidlaw met him and Ginty at the corner of King and Church streets, and Laidlaw asked them to take stock in the railway: that they both declined: that Laidlaw still pressed them very strongly to take stock: that he wanted to get a large amount of stock taken in the city of Toronto, to shew in the country what interest was taken in the matter in the city; and that he said that the ten per cent. would never be called for: that Laidlaw continued to press them to take stock, saying that he would give them a contract for building the railway if they would subscribe stock, and that if they did not get the contract they were not to be shareholders.

After it appeared that they were not to have a contract, they never notified the company dissenting from their subscription.

Ginty said as to this: "I saw that my name was on the stock list. I did not take any steps to have it taken off. I did not consider whether it would deceive other people. I was quite well aware that the directors did not consider me a shareholder."

As to the payment of the ten per cent., Ginty said: "I paid ten per cent. on my stock in a promissory note to Mr. Campbell. The cause of my paying it was, that I met Mr. Laidlaw, who said, 'If you do not pay your ten per cent., you cannot get the contract.' I most decidedly desired to get the contract. I then paid the ten per cent. I paid that money for the purpose of getting the contract. I never would have paid it, if it had not been for that."

And again: "I paid the \$400 in order to leave nothing undone in order to get the contract."

When he found that he did not get the contract, he said that he applied to Mr. Laidlaw and to the president of the company, but never to the board, to get his money repaid, but found he could not get it.

As to attending the meeting in August, 1869, he said: "I have no recollection of attending that meeting. I presume I attended it. I have been trying to recall it to my memory, but cannot. I have no idea what I went to the

meeting for. I presume I attended the meeting as a stockholder."

He said further, that the agreement as to the contract was made with Laidlaw alone, whom, he said, he considered to be the company.

Although calls were duly made and advertised as required by the statute upon all the stock, it appeared that the company had not sued the defendant for non-payment of such calls; and that if he was to be held to be a stockholder that ninety per cent. upon forty shares, amounting to \$3,600, remained unpaid upon the stock.

Mr. Laidlaw was absent in England, and his view of the transaction was therefore not shewn.

The learned Judge found that the defendant became a shareholder in fact and in law: that there was no agreement proved, either in fact or in law, that operated as a condition precedent to the defendant being a shareholder; and he found that Laidlaw had no authority in fact to make any such agreement as that propounded by the defendant; and he found a verdict for the plaintiff in each case upon all the issues.

NASMITH v. MANNING.

THIS case was the same as the above, except that Manning never paid the ten per cent., and never called for or received the certificate of allotment; and he swore that he never had any notice of the allotment having been made to him.

The learned Judge's finding and verdict was the same as in the above cases.

In this term, May 22, 1878, *Ferguson*, Q. C., obtained rules *nisi* to set aside these verdicts, and to enter verdicts for the defendants, pursuant to the Law Reform Act.

During the same term, June 1, 1878, cause was shewn, the rules being argued together.

Richards, Q. C., and *T. S. Kennedy*, for the plaintiffs Newman and Denison; and *Richards, Q. C.*, and *J. A. Proctor*, for the plaintiff Nasmith. The defendants' liability arises under section 80 of Consol. Stat. C., which provides for each shareholder being individually liable to unsatisfied judgment creditors of the company to the amount of their unpaid stock. The Act of Incorporation of the Toronto Grey and Bruce R. W. Co., 31 Vic. ch. 40, O., contains no definition of a shareholder; and in the General Railway Act, Consol. Stat. U. C. ch. 66, which is made applicable to the company, the only definition is that the word "shareholder" shall mean every subscriber to the undertaking. The word allotment is nowhere used in the Acts, and there is nothing to shew that any allotment is necessary. Under the English Acts two modes are provided for becoming stockholders, namely, by either subscribing the stock list, or by an application to the company for shares. Under the first mode the subscription itself makes the person signing a stockholder, while under the latter allotment and notice is no doubt necessary. The present cases come within the former mode, and therefore the subscription constituted the defendants stockholders: *East Gloucestershire R. W. Co., v. Smith*, L. R. 3 Ex. 15; *Re London and Provincial Consolidated Coal Co.*, L. R. 5 Ch. D. 525. Allotment only applies to the payment of the ten per cent. and future calls. The company might have no right of action until allotment; but this would not apply to creditors. Even if looked upon as a matter of contract, then it must be subject to the same rules as any other contract, namely, that an offer and acceptance constitutes a concluded contract. Here the company solicit the defendants to take stock, and the defendants agree to do so, and sign the stock list. This constituted a completed contract, and no further assent on the part of the company was necessary; at all events they will be deemed to have assented thereto, unless they have actively repudiated the subscription. Assuming that there

must be an allotment, and notice to the subscribers, there is clearly evidence of such allotment and notice. Apart from the other evidence, there is evidence that notices of the calls due from time to time were sent to all the shareholders in the ordinary course of business, and the reasonable presumption is that they were sent to the defendant. It is sufficient to prove that the notices were sent, and not their receipt: *Wall's Case*, L. R. 15 Eq. 18, overruling *British and American Telegraph Co. v. Colson*, L. R. 6 Ex. 108. The defendant Ginty by the payment of the ten per cent., and attending the meeting and acting as a shareholder, is now estopped from denying that he is such shareholder. The defendant Manning is likewise estopped. He and Ginty were in partnership, and the contract to be obtained was for the benefit of the firm. He, therefore, is responsible for Ginty's acts done with the object of obtaining the contract: *Levita's Case*, L. R. 3 Ch. 36; *Davies' Case*, 26 L. T. N. S. 650; *Richards v. Home Assurance Association*, L. R. 6 C. P. 591; *Re United Ports Co., Adams's Case*, L. R. 13 Eq. 474; *Forbes's Case*, 20 W. R. 585; *Re Mattock, &c., Co.*, 29 L. T. N. S. 324, *Lake Superior Navigation Co. v. Morrison*, 22 C. P. 217; *Buckley on Joint Stock Co.'s*, 2nd ed., pp. 40-56. The next point is, whether the defendants becoming stockholders was conditional on their obtaining a contract for building the railway. The agreement under which the stock was subscribed is under seal, and contains no such condition, and parol evidence is inadmissible to vary it: *Re Universal Banking Co., Rogers's Case*, L. R. 3 Ch. 633, 638; *Davidson v. Grange*, 4 Grant 377; *Mason v. Scott*, 22 Grant 593; but even if parol evidence is admissible, the evidence here is too vague. It does not appear what was the nature and terms of the contract. The contract was moreover contrary to the statute, and cannot be set up: *Port Whitby, &c., R. W. Co. v. Jones*, 31 U. C. R. 170, 174; *Port Dover and Lake Huron R. W. Co. v. Grey*, 36 U. C. R. 425; *Peck v. Gurney*, L. R. 13 Eq. 79. But even if within the powers of the company it is beyond the powers of a provisional director; and it

was never communicated to the company and assented to by them : *Michie v. Erie and Huron R. W. Co.*, 26 C. P. 566, The defendants, when they found that the contract was not to be awarded to them, should have applied to the Court of Chancery to have had their name removed from the stock list; and they are now estopped by their laches from denying their liability after the rights of creditors have intervened, who gave credit to the company on the faith of the stock list : *Heymann v. European Central R. W. Co.*, L. R. 7 Eq. 154 ; *Brice* on Ultra Vires, 2nd ed., 337, 345 ; *Scholey v. Central R. W. Co. of Venezuela*, L. R. 9 Eq. 266 note. See also *Rankin v. Hop and Malt Exchange Co.*, 20 L. T. N. S. 207 ; *Bloxam's Case*, 33 Beav. 529 ; *Moore v. Hodson*, 11 C. P. 444, 453.

Ferguson, Q. C., contra. The defendants subscription to the stock list is not of itself sufficient to constitute them shareholders. It is equivalent merely to an application for shares under the English Act, so that the English cases apply which shew that there must be an allotment and notice thereof to the subscriber. There must be some assent by the company. To conclusively shew this, it is only necessary to suppose that the stock is very valuable ; it cannot be argued that any person signing the stock list is entitled without any assent by the company to put down his name for the whole of the stock. The Act 31 Vic. ch. 40, O., as also the heading of the stock list, shews that allotment is necessary, and allotment includes notice. It may be argued, and perhaps rightly, that express notice is not necessary so long as there is evidence from which notice can be implied. There is no such evidence here. Both the defendants expressly deny that they ever received any notice ; and the only evidence attempted to be set up is, that of the secretary of the company, who states that the defendants in the ordinary course of business must have received notice. The onus of proving notice is on the plaintiffs, and they must shew not only that the notice was sent but that it was received : *British and American Telegraph Co. v. Colson*, L. R. 6 Ex. 108.

Moreover, not only must such notice be proved, but there must also be evidence of the defendants' acceptance of the allotment when notified. The next point is, that the subscription was conditional on the defendants obtaining a contract for building the railway. Parol evidence in support of this conditional agreement is clearly admissible. There is nothing to prevent a person stipulating as to the terms upon which he will become a shareholder; and the parol agreement does not vary, but is merely explanatory or supplementary of the written contract. The terms of the contract are sufficiently definite. The proof is as definite as the allegations in the pleas, which have not been demurred to, and similar pleas have already been held good: *Bullivant v. Manning*, 41 U. C. R. 517. There was no obligation on the defendants to have applied to the Court of Chancery to have had their names removed from the stock list, as the public have no right to inspect it. In England it is different. There there is a registered stock list for the inspection of the public. In the case of *Ginty* it is urged that the payment of the ten per cent., and his attending the meeting, estops him from denying his liability; but he satisfactorily explains that this was done with a view of obtaining the contract, and not with the view of becoming a stockholder, and the intention must govern: *Pellatt's Case*, L. R. 2 Ch. 527; *Simpson's Case*, L. R. 4 Ch. 184. There is clearly no evidence to shew any notice to Manning.

June 28, 1878. GWYNNE, J.—The fifth and sixth pleas in substance amount to no more than pleas setting forth the matters upon which the defendant relies for establishing his first plea, namely, that he is not a holder of shares in the company.

If the evidence had established that the agreement relied upon had been made with the company and not with Mr. Laidlaw alone, who was only one of twenty-one provisional directors appointed by the Act of incorporation to manage the affairs of the company until \$300,000 of stock should

be subscribed for, and ten per cent. should be paid thereon irrespective of municipal stock, the question might be determined upon the matters set out in the pleas; and these matters, as it appears to me, properly construed, profess only to set up a verbal agreement for avoiding a perfected contract for the defendant becoming and being a shareholder, upon the happening of a condition subsequent, and not to set up a conditional agreement for the defendant to become a stockholder upon condition of there first happening an event which has never happened. The pleas in fact set up a verbal agreement inconsistent with and subversive of the provisions of the statute incorporating the company regulating the taking and holding stock in the company.

The Act provides that the subscribers of the capital stock who have paid ten per cent. upon the amounts by them respectively subscribed, are the persons who shall elect the directors, who are to assume the control and management of the company so soon as \$300,000, independent of municipal subscriptions, shall have been subscribed and ten per cent. paid thereon. It provides, also, that upon subscription each subscriber shall pay to the directors ten per cent. upon the amount by him subscribed, which the directors shall pay into some bank, from which it shall on no account be withdrawn unless for the service of the company; and that thereafter, that is after the payment of the first ten per cent., such subscriptions shall be liable to calls not exceeding ten per cent. each. See 31 Vic. ch. 40, secs. 14, 17, 27, 28, O.

The Railway Act, C. S. C. ch. 66, which is incorporated with and made part of the private Act, enacts, in sec. 50, that every shareholder shall be liable for calls: that he may dispose of his shares, although he has not a certificate: sec. 55; and the only control which is given to the company over shares subscribed for is to forfeit them for non-payment of calls; whereas the plea sets up an agreement between the company and a particular shareholder to the effect that he shall be relieved of the obligations imposed

by the statute upon all shareholders, and shall, although a shareholder, be treated by the company, upon the happening or not happening of a subsequent event, as if he were not a stockholder. This agreement implies that until the happening or not happening of a subsequent event, the party to be relieved is a shareholder.

But in the case before us the agreement which is relied upon, instead of having been made with the company, is admitted to have been made only with Mr. Laidlaw, the chief promoter, it is said, of the company, but who was only one of twenty-one provisional directors, whose power of managing the affairs of the company terminated upon the election of directors by the stockholders who had paid ten per cent. upon their respective subscriptions; and it is apparent that the contract which the defendant contemplated that he and his partner, Mr. Manning, should receive should be given by the *elected* directors. So that, however great the defendant may have believed the influence of Mr. Laidlaw to have been, we must, I think, upon this evidence hold that the promise which the defendant says he relied upon, and was the inducement to him to subscribe for shares to the amount of \$4,000, and upon which he paid the ten per cent. required by the Act to be paid, and which was never to be withdrawn unless in the service of the company, was the personal promise of Mr. Laidlaw, and was in no way binding upon the company.

By the agreement which the defendant signed in the stock book of the company upon the 14th of May, 1869, he became bound to become a holder of forty shares in the capital stock of the company, and he covenanted that upon the allotment by the said company to him of that number of shares, he would pay ten per cent. to the company, and that he would also pay all future calls upon the said shares. There is here no condition whatever attached to this agreement other than that the company shall allot to the defendant the forty shares. The defendant must be held to have known the legal effect of such allotment being made to him, and that thereupon he would become a share-

holder, subject to the provisions of the Act as affecting all shareholders alike, for he had covenanted to accept the shares *and* to pay the ten per cent. thereon.

But it was argued before us that it was optional with the company to make the allotment or not at their pleasure, and that therefore the effect of the instrument signed was merely an application for the specific number of shares, and an agreement to take them, if allotted, and that so the instrument is equivalent to an application for shares in England; and that the cases in England apply which decide that it was necessary for the company to communicate to the defendant the fact of their having made the allotment.

It was indeed further contended that not only was such notice necessary, but that in order to complete the transaction which would make the defendant a shareholder, it was necessary that the defendant should accept the allotment, which would not be complete until payment of the ten per cent.

This latter contention, it may be observed, would have wholly neutralized the defendant's covenant, whereby upon allotment he covenanted to pay the ten per cent., thereby shewing the defendant's understanding that the fact of allotment was a thing independent of payment of the ten per cent., and which would make the defendant liable under his subscription contract to pay that sum; but in this case it is unnecessary to dwell upon this point, because the defendant did pay the ten per cent.

Treating then the instrument signed by the defendant to be an application to the company for forty shares, with a covenant upon his part upon allotment to accept them, it may be admitted upon principle, as well as upon the authority of *Pellatt's Case*, L.R. 2 Ch. 527, that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract.

In *Gunn's Case*, L. R. 3 Ch. 40, Sir John Rolt, Lord Justice, referring to the language extracted from the judgment of Lord Cairns in *Pellatt's Case*, says, p. 45, that what

Lord Cairns meant was—not that there must be a response in writing, but that there must be, in writing or verbally, or by conduct, something to shew the applicant that there was a response by the company to his offer.

In *Levita's Case*, L. R. 3 Ch. 36, Sir John Rolt held that Levita, who had applied for shares as trustee for another, and to whom no letter of allotment was ever sent, but who was entered upon the register in respect of the shares, and advertised as a director, and who had attended a meeting of the directors, but took no steps to have his name removed for two years, was liable as a contributory in respect of these shares.

Now, in the case before us, it appears that the company did allot the shares to the defendant: that they sent a certificate of such allotment to their brokers for them to receive the ten per cent. payable thereupon: that they advertised a notice in a daily paper published in the city, that those certificates were lying at their brokers, who were authorized to receive the ten per cent.: that the defendant went to the brokers and paid them the ten per cent. upon the forty shares subscribed for by him; and the fair inference to be drawn is, that he received his certificate of being the owner of the shares. His name is thereupon entered in the books kept by the company, as required by sec. 112 of ch. 66 of the Consolidated Statutes of Canada, as the owner of these forty shares; with a credit of ten per cent. as paid thereon.

And he attended the first meeting held for the election of directors, and voted thereat, and took part in the proceedings of the meeting, which he could not legally do except as a shareholder, who had paid under the provisions of the Act of Incorporation ten per cent. upon the amount of the shares held by him.

Under these circumstances it seems to be impossible to contend that the defendant is not a shareholder within the definition of that term in the Railway Act, or that he is not subject to the provisions of sec. 80 of that Act, being sec. 30 of ch. 165 of the Revised Statutes, which enacts

that "Each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities of the company, and until the whole amount of his stock has been paid up.

The principle which governed the decision in *Elkington's Case*, L. R. 2 Ch. 511, is that which must govern these cases, namely, that if the defendant intended and agreed to become a member and shareholder in *præsenti*, immediately upon allotment, with a collateral agreement as to what should be the effect of his becoming a shareholder upon the granting of a contract at a future time by the company, then the defendant is a shareholder and liable in this action; but that the defendant should not be liable if his agreement was that if and when a contract should be granted to the defendant and Manning, and not otherwise or sooner, the defendant would become a member and shareholder. And it appears to me to be impossible to hold otherwise than that the former of these two positions is that in which the defendant is. Indeed, the reason given by the defendant for his paying the ten per cent. as a step towards his obtaining the contract seems conclusive upon this point; for it is plain that the defendant understood from Laidlaw the nature of the agreement with him to be, that Ginty and Manning both becoming actual subscribers for shares was a *condition precedent* to their getting the contract.

Now, it appears that the defendant alone paid the ten per cent. upon the amount subscribed by him, and that Manning never did upon the shares agreed to be taken by him. Whether the fact of Manning not having paid the ten per cent. upon the amount he agreed to take upon allotment may or may not have the effect of relieving him from being a shareholder, or whether for any other reason he is to be held not to be a shareholder, is another question; but if, as appears to me to be clear, subscription by both was a condition precedent to their getting or being entitled to get the contract, assuming the agreement to be binding

upon the company, then, if *both* are not shareholders, neither one or other would seem to have any reason to complain that the contract was not given to him ; but with the question whether or not the defendant and Manning can have any relief against the company in respect of a breach, if any there has been, of Laidlaw's promise, we have nothing to do here. The plaintiffs are entitled to recover, irrespective of any such question if the defendant became a shareholder in the company.

HAGARTY, C. J., concurred.

Rules discharged.

NASMITH V. MANNING.

GWYNNE, J.—This case differs only in its facts from the preceding cases, *Newman v. Ginty, &c.*, in this, that Manning never paid the ten per cent., and never called for or received the certificate of allotment ; and he swears that he never had any notice of the allotment having been made to him.

Looking at the terms of the agreement by the defendant in the books of the company, which was signed and sealed by the defendant upon the 19th of June, 1869, the defendant agreed to become a holder of fifty shares in the capital stock of the company, and upon allotment to pay ten per cent. of the amount of such shares ; and looking upon the construction put by the company upon that agreement, treating it as an application for shares, as appears by their certificate of allotment, and having regard to the terms of the printed receipt endorsed upon the certificate, and upon the authority of *Redpath's Case*, L. R. 11 Eq. 86 ; *Wall's Case*, L. R. 15 Eq. 18 ; *Pellatt's Case*, L. R. 2 Ch. 527, and *Gunn's Case*, L. R. 3 Ch. 40, 45, there should be shewn to have been some response, either in writing or verbally or by

conduct, communicating to the defendant that the company had accepted his application and himself as a shareholder for the fifty shares mentioned in his agreement before he can be held liable as a shareholder ; and as this point does not appear to have been sufficiently considered at the trial, and the learned Judge who tried the case has rendered no verdict finding how that fact is, I think there should be a new trial in this case, costs to abide the event.

HAGARTY, C. J.—I concur in thinking that our best course is to direct a new trial so as to have it expressly found as a fact whether the defendant was notified, or received notice in any shape, or was made aware of the company having accepted him as a stockholder according to his subscription—notice, in substance, that the directors or the company assented to or accepted him as the holder of the subscribed shares.

I think, as the claim is large, it may be well to have this point clearly ascertained.

I express no opinion as to the sufficiency of the evidence in its present shape.

Rule accordingly.

LOUCKS v. MCSLOY.

Chattel mortgage—Verbal consent to sale—Property passing—Estoppel—Damages.

A chattel mortgage contained a proviso that in case the mortgagor should attempt to sell, &c., the mortgaged goods, or any of them, without the mortgagee's written consent, the mortgagee might enter and take the goods. The mortgagor, without such written consent, sold a pair of horses, part of the mortgaged goods, to the plaintiff, when the defendant, the mortgagee, entered and took them, and after keeping them for four days he returned them to the plaintiff, who was not subsequently disturbed in his possession. The plaintiff having sued the defendant for the taking:

Held, that he was entitled to recover, for that the evidence, as set out below, shewed that the defendant either verbally consented to the sale or acted in such a manner as estopped him from denying that the property passed to the plaintiff.

Bunker v. Emmanv, 28 C. P. 438 distinguished.

Held, also, that the plaintiff could only recover damages for the four days' detention, and not for the value of the horses in addition.

DECLARATION. First count: for that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of a span of horses.

Second count: for that the defendant seized and took the plaintiff's horses, and carried them away, and disposed of them to his own use.

The common counts for goods sold, work done, money lent, &c., were added.

Pleas: To the first count: not guilty.

To the second count: that the horses were not the plaintiff's as alleged.

To the second count: that one Robinson had mortgaged the horses to the defendant for a valuable consideration, by a mortgage which contained a covenant, that in the event of Robinson attempting to sell or dispose of the horses without the consent of the defendant to such sale first had and obtained in writing, then it should be lawful for the defendant to take the horses wherever found: that Robinson did sell the horses to the plaintiff, and that thereupon the defendant took the horses under and by virtue of the power contained in the mortgage, which is the grievance complained of in the plaintiff's declaration.

There was a further plea to the second count: that after the commencement of this suit the defendant returned and delivered to the plaintiff the horses mentioned in the plaintiff's declaration, and the plaintiff accepted the same.

There was also a further plea to the second count: that the defendant tendered the plaintiff the sum of \$10, and says that the same is sufficient to satisfy the plaintiff's costs in this action, and now brings the same into Court.

To the common counts: never indebted.

Issue.

The cause was tried before Patterson, J. A., without a jury, at St. Thomas, at the Spring Assizes of 1878.

It appeared that one Thomas Robinson by a chattel mortgage, dated the 17th December, 1877, mortgaged to the defendant a span of horses and divers other goods and chattels. The chattel mortgage contained a proviso that, in case the mortgagor should "attempt to sell or dispose of or in any way part with the possession of the said goods and chattels, or any of them, or to remove the same or any part thereof out of the county, without the consent of the said mortgagee to such sale, removal or disposal thereof *first had and obtained in writing*, then, and in such case, the whole of the moneys thereby secured shall become due and payable, and it shall and may be lawful for the mortgagee," &c., "at any time during the day to enter into and upon any lands," &c., "and to take possession of the goods and chattels and to remove them and to sell the same, and thereby to realize the mortgage debt and pay over the surplus, if any, to the mortgagor.

Subsequently in the same month of December the mortgagor, Robinson, sold the horses to the plaintiff.

In March the defendant, treating the sale as a breach of the condition in the mortgage, took the horses out of the possession of the plaintiff, and four days thereafter, upon the 16th March, upon service of the writ in this action, returned the horses to the plaintiff upon his promise to return them on the day of sale. No day of sale was ever fixed, and consequently the day of sale never arrived, and

the plaintiff had never since been disturbed in his possession of the horses. Notwithstanding that this took place upon the day the writ in this action issued and was served, the plaintiff proceeded to declare against the defendant.

At the trial the plaintiff himself testified that he had no knowledge of the existence of the chattel mortgage, when he purchased the horses from Robinson, which he did for \$200: that upon the 12th of March, 1878, the defendant took them out of his possession (which he did under the condition in the mortgage): that upon the 16th March the plaintiff caused to be issued and served the writ in this action, and that thereupon the defendant returned him the horses upon his promise that he would produce them on the day of sale: that no day of sale has ever come or been named; and that the plaintiff has not since been disturbed in his possession of the horses. The plaintiff estimated his damages at \$3 per day for the four days that he was deprived of the horses. The plaintiff also said that the first time he heard of the mortgage was in the first week of January, 1878, when the defendant told him of it, and at the same time told him to keep it still for a few days until he and Robinson should settle about a farm called the Hawtrey property. This was a piece of property which the plaintiff had given to Robinson in exchange for another piece of land and the horses.

The plaintiff also said that when the defendant seized the horses in March, the plaintiff and defendant went to Robinson, when, as he said, a dispute arose between Robinson and the defendant about the latter having agreed to release the horses from the mortgage, which the defendant denied.

The plaintiff's wife, speaking of the interview between the defendant and the plaintiff in the first week of January, said: "About a week after we got the horses, the defendant told us of the chattel mortgage, and told the plaintiff to keep quiet for a few days, as they"—that is the Robinsons—"were talking of letting him have the place they got from us." She also said that "in the last week in Feb-

ruary the defendant came to our place and asked me, were we going to take the horses back to Robinson's? He said that Robinson had not settled with him. I said that Robinson had told us the defendant had given a written permit in Mr. Duncombe's office to sell the horses, and he (that is the defendant) said, let them shew the permit. He said they were to give him \$100 to release the mortgage on the horses, and they had not done it."

One *Edward Winters* testified that in a conversation with the defendant, on the 25th of February, the latter told witness that he held a chattel mortgage on the horses and on all of Robinson's loose property, and also a mortgage on his real estate. The defendant then spoke of Robinson having sold the horses. Witness asked him how he permitted that, and the defendant replied he had given a permit to sell the horses.

Sarah Robinson, the mortgagor's wife, said that they had not told the plaintiff of the chattel mortgage when they sold him the horses, for that the defendant "told us to keep it quiet, and told Robinson he might sell the horses, and he would give him a permit to do so."

According to the evidence of this witness, and of the defendant himself, the transaction out of which the chattel mortgage arose was as follows:—Mrs. Robinson owned 100 acres of land in Windham, which was subject to a mortgage for \$1,200, and 50 acres of the 100 was subject to a further mortgage for \$200. This 100 acres she conveyed to the defendant. The defendant afterwards retaining the 50 acres, which was subject to the \$200 mortgage, conveyed back to the Robinsons the other 50 acres, they assuming the \$1,200 mortgage, and also undertaking to relieve the defendant's 50 acres from the \$200, and the chattel mortgage was given to the defendant as security for the Robinsons paying off the \$200 mortgage on the 50 acres.

This arrangement having been made, the defendant and the Robinsons went home together, and she said that upon the chattel mortgage being so given the defendant and Mr. Duncombe, in whose office the deeds were executed,

told Robinson to go on and sell the horses all the same, he having said when he gave the mortgage that he wanted to sell them. She added that on their way home the defendant told Robinson to go to the plaintiff, and that he thought he could work up a sale of the horses to him. The next day the Robinsons saw Loucks, and made a bargain with him for the exchange with him of twenty-four acres, which was subject to a mortgage for \$400, which, with the horses the Robinsons agreed to give to the plaintiff for the piece of land called the Hawtrey property, the plaintiff undertaking to pay off the \$400 mortgage.

Mr. Robinson said: "We told the defendant that we had made a bargain to bargain the horses away, if it was agreeable to him. He said it was all right, and that we could not have got that chance if it had not been for him."

The defendant's account of this part of the transaction was as follows: "On the way home from Simcoe, I told Mrs. Robinson about Mr. Loucks, the plaintiff, and that she probably could make a deal with him. I did not refer to the horses, but answered her, when she said that if she could make another twist she could clear herself. Mrs. Robinson told me the next day that she had made a bargain with the plaintiff. I told her I would not stand in the way of her getting all she could, but would hold my claim."

Again he said: "When they (the Robinsons) made a bargain with the plaintiff they came to me, and I said I would not stand in the way of their selling them, but that I would not loose my hold on them till my chattel mortgage was satisfied. I told her she had done well in selling them for \$200. Mrs. Robinson told me they were getting money from Mr. Welsh on the Hawtrey property" (to pay him.)

Then it appeared that on the 29th of January, 1878, the Robinsons executed to the defendant a mortgage upon the Hawtrey property, which they had gotten from the plaintiff to secure payment to the defendant of \$400. The defendant himself says that this \$400 consisted of \$300,

part of the \$1,200 which he had paid, and \$100, half of the \$200 secured by the chattel mortgage.

The defendant said that upon this mortgage being given the Robinsons wanted him to sign a paper to release the horses from the chattel mortgage. He, however, did not sign such release. He said, however, that he agreed to hold the mortgage for the \$400 without registering it, to enable the Robinsons to give to Welsh a first mortgage upon the Hawtrey property for the \$100 balance of the defendant's chattel mortgage, which the defendant was to receive if Welsh should lend it to the Robinsons. Whether this loan was effected or not, did not appear. The defendant said that he had not paid the mortgage upon his fifty acres, as indemnity against the chattel mortgage was given.

He added: "I did not want to keep the horses. I did not want to press the man. I considered the poor man (the plaintiff) had paid a big price, and I did not want to harm him."

The learned Judge left it to the jury to say whether or not the defendant did, as Mrs. Robinson had said, consent to the sale of the horses to the plaintiff; and he ruled that in case he did so consent, and that the sale and delivery were made to the plaintiff in pursuance of that consent, the property passed, the effect being to release the horses from the mortgage; and he reserved leave to the defendant to move against this ruling, and to enter a nonsuit.

The jury rendered a verdict for the plaintiff, with \$210 damages.

In this term, May 22, 1878, *Robertson*, Q. C., obtained a rule to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to the leave reserved.

During the same term, June 3, 1878, *Read*, Q. C., shewed cause. The question here depends upon the construction to be placed upon the proviso in the mortgage enabling the mortgagee to enter in case of the mortgagor's attempting to sell, &c., without the mortgagee's consent in writing. This proviso only applies to an attempt to sell, so as to

give a right of entry previous to sale, where a written consent would no doubt be necessary. But it was never intended to apply to a case like the present, where a sale has taken place, and an innocent purchaser has paid his purchase money. The verbal consent is however sufficient, as it clearly proved to have been given and acted upon; at all events the mortgagee would be estopped from denying such consent.

Robertson, Q. C., contra. By the mortgage the property in the goods is in the defendant. The object of the proviso is that in case the mortgagor shall attempt not only to sell the goods, but also to in any way part with the possession of them, without the mortgagee's consent in writing, the mortgagee shall have the right to enter and take the goods. The mortgagor cannot by any attempted sale vest the property in the goods in a purchaser. A written consent would no doubt estop the mortgagee from denying that the property passed, but no such effect can be given to a verbal consent. The mortgagee however denies that he ever gave such consent.

June 28, 1878. GWYNNE, J.—It is difficult to understand why the defendant pleaded not guilty alone to the count for conversion, and why he confined the other pleas to the second count, which, though framed in trespass, does also include the conversion of the horses to the plaintiff's use.

To this second count, which thus contains within it the charge which is involved in the first count, the defendant pleads a plea which upon the authority of *McKenzie v. Kittridge*, 24 C. P. 145, and the cases there cited, is in form a good plea to the further maintenance of the action. Whether the matter does or not in substance constitute a good defence to the further maintenance of the action is a point not raised, for the plaintiff has merely joined issue upon the plea.

If, then, the issues raised by any of the pleas which the defendant has pleaded to the second count in bar of the

action or if the issue joined upon the plea to the further maintenance of the action comprised in the second count should be found in favour of the defendant, he should, for the advancement of justice, have the benefit of that finding in respect of the first count also (as there was but one taking), notwithstanding the defect in the form of the pleas, namely, in their being limited to the second count only.

There are several material facts established by the evidence, namely, that the Robinsons entered into the treaty with the plaintiff, which resulted in the bargain made between him and the Robinsons, upon the suggestion of the defendant: that before the Robinsons entered upon such treaty they had the defendant's verbal authority to dispose of the horses, if they should think fit: that after they had made their bargain with the plaintiff, they told the defendant of it, and that they had agreed to let the plaintiff have the horses; and that the defendant said he would not stand in the way, although, as he says, he added he would not loose his hold on them until his chattel mortgage should be satisfied: that in the first week in January, after the transaction between the plaintiff and the Robinsons had been completed, when the defendant first informed the plaintiff of the chattel mortgage, he told him to keep it still for a few days until they should settle with the defendant about the Hawtrey property; and the defendant himself says that when the plaintiff told him he had bought the horses, "I told him that if Robinson carried out the agreement it would be all right." The fair inference to draw is, that the agreement referred to was that which was subsequently carried out upon the 29th of January by the mortgage of the Hawtrey property for \$400, whereby the defendant obtained a security for that amount upon property which only became the property of the Robinsons so as to enable them to mortgage it, upon the faith that the bargain with the plaintiff was good and valid, and that his title to the horses had been secured. Then it appears that the defendant agreed to postpone the registration of this mortgage to enable the Robinsons to

raise the \$100 balance of the sum secured by the chattel mortgage.

The defendant stated, "I did not want to press the man. I considered the poor man (the plaintiff) had paid a big price, and I did not want to harm him."

This observation appears plainly to apply to his having given back the horses after they had been seized in March, and seems to be intended to convey the idea, which is consistent with the plea as to further maintenance of the action, that the defendant did not intend again to disturb, as he in fact has not since disturbed, the plaintiff in the possession of the horses.

The question raised in this case is whether or not it comes within the decision of this Court in *Bunker v. Emmany*, 28 C. P. 438, or is rather within the exception to the rule which governed that case, pointed out by the learned Chief Justice, at p. 442, wherein he says: "Where the verbal assent was either admitted or proved clearly to have been given and acted on, it is a very intelligible equity to prevent the setting up of the formal provision as to a written assent."

There can be no doubt that the circumstances attending the sale of a chattel comprised in a chattel mortgage, containing a condition in the terms of the chattel mortgage produced in evidence, may amount to a good and valid sale to a purchaser, passing the property to him, notwithstanding that there may have been no written assent of the mortgagee to the mortgagor's selling.

The transaction may assume the shape of a sale by the mortgagee, with the concurrence of the mortgagor, or the mortgagee being the person actively procuring the sale, may constitute the mortgagor his agent to effect the sale; or after the sale by the mortgagor, with or without a verbal assent or direction, the mortgagee may affirm the sale and take benefit from it, so confirming the transfer of the property.

Without at all infringing upon the decision in *Bunker v. Emmany*, 28 C. P. 438, where the only evidence of any

assent by the mortgagee to the sale was the assertion of the mortgagor, denied by the mortgagee, I am of opinion that there are many circumstances in this case which preclude the defendant from denying that the property passed to the plaintiff, and estop him in all justice from relying upon the condition in the mortgage to defeat the plaintiff's title. I refer chiefly to what passed between the plaintiff and defendant, immediately after the sale of the horses to the plaintiff, when the defendant told him to remain quiet for a few days, and that the sale would be all right if the Robinsons would complete their agreement about the Hawtrey property, and the defendant remaining quiet with a knowledge of the plaintiff's claim to the horses, until the Robinsons executed a mortgage to the defendant upon that Hawtrey property which they had acquired upon the faith of the validity of the sale of the horses to the plaintiff. When the defendant took that mortgage, agreeing at the same time not to register it, so as to enable the Robinsons to execute a first mortgage upon it to another person to raise the \$100 balance of the sum mentioned in the chattel mortgage, the defendant must be held to have confirmed the sale of the horses, by means of which the Robinsons acquired the property upon which the defendant accepted a substitutional mortgage.

Under these circumstances, I do not think the defendant can be permitted to dispute the plaintiff's title to the horses, and that I gather from the plea which has been pleaded to the further maintenance of the action, and from the passage which I have quoted from his evidence as appearing to me to be in explanation of his reason for giving the horses back to the plaintiff, was the defendant's own view of the case when he did return the horses.

Whether this mortgage, which is sworn to have been executed for the purpose of securing a sum wherein, as sworn, Thomas Robinson was justly indebted to the defendant, but which is admitted upon the evidence of the defendant himself to have been executed as an indemnity merely against a mortgage upon a piece of land conveyed

by Mrs. Robinson to the defendant, could have been set up at all against a purchaser of the horses for value was not raised at the trial or on the argument before us. The defendant, as it seems to me, intended by his informal plea to the further maintenance of the action, to abandon all claim to the horses, but in his plea he failed to plead to the cause of action involved in his having taken and kept possession of the horses for the four days. If he had pleaded the payment of \$10 into Court, to satisfy all damages occasioned by that detention, instead of pleading it as he did by a subsequent informal plea, as paid to meet all costs of the plaintiff merely, the real question would have been clearly defined to be whether \$10 paid into Court to satisfy such damages was sufficient for the purpose. The plaintiff, however, having always, except during the four days, had possession of the horses upon a promise to give them up only if required for sale under the terms of the mortgage, and the defendant having intended, as it appears to me we may fairly hold him to have intended by his plea to the further maintenance of the action (defective though that plea be) to intimate his abandonment of his claim to the horses, the damages sustained by the plaintiff during the four days that he was deprived of the use of the horses does appear to have been in truth what was in contest before the jury, and that to which their damages should have been confined. The plaintiff claimed for these damages \$12. By the amount which the jury have allowed in excess of what was proved to be the price of the horses to the plaintiff, they would seem to have allowed the excess, viz., \$10, to cover that damage.

This is not a case wherein the value of the horses should be given as damages, nor do I think it would be at all fair under the circumstances to allow a verdict for their value to remain, even though the effect of the verdict, coupled with satisfaction of the judgment to be entered thereon, might be to vest the title to the horses in the defendant; *Non Constat*, but that the horses may have deteriorated in value by something which may have occurred to them

since they were returned to the plaintiff, or might yet occur to them before by satisfaction of the judgment the defendant's title to them would become perfect.

All that the plaintiff can in justice demand is satisfaction for the injury sustained by him during the four days he was deprived of the use of the horses, and as the jury would seem to have assessed these damages at the sum of \$10, which appears to be abundantly sufficient, I think that we should interpose our jurisdiction to grant to the defendant a new trial without costs, unless the plaintiff will consent to his verdict being reduced to \$10, with full costs of suit, and upon the plaintiff so consenting the defendant's rule should be discharged, with costs.

The defendant might have prevented all difficulty if his plea to the further maintenance of the action had been accompanied by a payment into Court of a sum to satisfy the damages occasioned by the four days' detention, and if he had not (inconsistently with such a plea as it appears to me,) unnecessarily raised issues asserting title to the horses under the chattel mortgage. He should, therefore, pay all costs occasioned by such defences.

HAGARTY, C. J., concurred.

Rule accordingly.

LEYS v. HOLLINGSHEAD.

Mortgage—Delivery—Evidence.

Under an agreement for the sale of land the defendant, on the execution to him of the deed thereof and removal of certain prior incumbrances, was to give back a mortgage for the balance of the purchase money. The defendant by agreement went into possession, and afterwards executed a mortgage and left it with his solicitors, with, as he stated, express instructions not to deliver it over until he was satisfied that all was right and assented to their doing so, and he alleged that without such approval or consent they had filled in the date and delivered it over. In consequence of delay in removal of the incumbrances defendant claimed that the agreement was at an end and quitted possession, repudiating the delivery of the mortgage as being without his consent.

In an action by the plaintiff, assignee of the mortgage, on the covenant to pay the mortgage money :

Held, that the evidence, set out below, shewed that the defendant was fully cognizant of his solicitors' dealings in the matter, and had authorized their delivering the mortgage whenever they should deem it advisable to do so in defendant's interests, which it appeared they had fully protected ; and that on the faith of the solicitors' acts the position of the parties was changed, namely, a conveyance executed vesting the title in the defendant and incumbrances removed, all of which took place before the defendant quitted possession. The plaintiff was therefore held entitled to recover.

THIS was an action on the covenant to pay the mortgage money in a mortgage made by the defendant to Grant et al, and assigned by them to the plaintiff.

Pleas : 1. *Non est factum*. 2. Traverse of the assignment to the plaintiff.

The cause was tried before Armour, J., without a jury, at Toronto, at the Spring Assizes of 1878.

It appeared that a mortgage was put in, dated 1st November, 1876, made by the defendant and wife to J. N. Grant and Brothers for \$1,199, on certain land in Toronto payable in quarterly payments of \$50 and interest, &c. The defendant admitted the signature, but denied delivery.

The subscribing witness was Alexander Hagart. The assignment thereof was dated 10th December, 1876, from the Grants to the plaintiff.

The defendant was then called as a witness. His defence was, that he executed the mortgage and gave it undated to Mr. Hagart, his solicitor, to have no effect till the defendant was satisfied all was right : that at that time the

deed of the property had not been made to defendant, and there were encumbrances. The mortgage, he said, was signed to facilitate the business, to have defendant's side of the business ready.

The defendant had gone into possession of the property in April, 1876, under agreement with the Grant Brothers, and remained in possession till January 10th, 1877, when he left voluntarily.

The defendant said he signed the mortgage about December 1st, 1876.

He said he never authorized Hagart to fill in the date, and that he had no right to deliver it up without his consent.

His wife corroborated his statement.

The whole question was, whether the mortgage was a complete effective instrument in the plaintiff's hands, binding on the defendant.

By agreement, dated 1st May, 1876, Grant Brothers agreed to sell this property to the defendant for \$4,420, and to give him a clear title, he giving back mortgages thereon as specified. They were to finish certain work on the house, and to give a clear deed in a month from date, and on execution of the deed and performance of agreement, he was to give a mortgage or mortgages as required, the title deeds to be produced to him or his solicitor, &c.

At the time of the agreement there were three mortgages on the place, 1st to R. Beaty ; 2nd to Trust and Loan Co. ; 3rd to the plaintiff, Leys.

It was admitted that no certificates of discharge of these mortgages were delivered or registered till 10th January.

A correspondence between the plaintiff and the defendant's solicitors, Watson and Hagart, was put in, beginning October 16th, 1876. The plaintiff was then acting for Grant Brothers. He was pressing to have the matter closed.

On November, 14th, the defendant's solicitors enclosed a draft mortgage from the defendant to Grant, saying that if correct they would have it engrossed and executed at once.

They also returned the draft deed of the Grants to the defendant.

On November 24th, the plaintiff wrote angrily, threatening to let the Trust and Loan Company proceed and eject the defendants, if the mortgage was not executed the next day.

The mortgage bore date 1st November.

On the 7th December, the plaintiff signed an undertaking, that on Watson and Hagart handing to him the mortgage from the defendant to the Grants, he undertook to register, within forty-eight hours, the deed from the Grants to the defendant, and discharges of all the mortgages prior to the Freehold Loan mortgage, and to have all executions withdrawn from the sheriff's office, and pay them \$17 for costs of conveyancing.

The plaintiff proved that Hagart brought the executed mortgage to his office: that thereupon the deed from the Grants to the defendant was executed, and he gave the above undertaking.

The plaintiff had a mortgage on the property from the Grants, and he agreed to take the defendant's mortgage from the Grants in payment of their mortgage to him. Some delay took place as to clearing encumbrances.

On 12th December, the defendant's solicitors wrote, urging completion. And again to the same effect on 22nd December.

On 28th December, to the like effect, reminding the plaintiff of his personal undertaking.

On 3rd January, they again wrote that they had received peremptory instructions from their client, (defendant), that unless the matter was closed the same day they would institute proceedings, and that in addition to redress against his clients, they had the plaintiff's personal undertaking.

On 4th January, the plaintiff wrote that the Trust and Loan and his own mortgage were discharged, and the Beaty mortgage would be settled that day. He hoped the defendant would pay his instalment due in a few days.

On January 9th, the defendant's solicitors wrote, that as

the agreement was not carried out all negotiations must be considered at an end, and the defendant would refuse to deal further with the plaintiff or the Grants, and they would require a re-delivery of the mortgage forthwith, and repayment of the money paid the Grants, and the defendant instructed his solicitors to say that he would allow a reasonable rent for the time he had occupied premises, and would quit possession on notice to that effect.

On the same day the plaintiff wrote back that the mortgages were all paid, and he hardly understood the letter, reminding them that an instalment would be due 1st February.

This closed the correspondence in evidence.

On 10th January, or next day, it seemed the defendant left the premises.

The defendant stated in his evidence that he instructed his solicitors to bring an action against the plaintiff for breach of promise or breach of trust, to recover the mortgage, but they did not do so: that he instructed them to bring an action against the Grants to recover the \$400 cash he had paid them on the original agreement for purchase, and he failed in that action.

The plaintiff proved that the title was still in the defendant, and that he had never tendered back the conveyance. The conveyance to him and his mortgage were on record.

The learned Judge entered a verdict for the plaintiff, reserving leave to the defendant to move.

In this term, May 23, 1878, *J. B. Clarke* obtained a rule *nisi* to set aside the verdict entered for the plaintiff and to enter a verdict for the defendant.

In the same term, June 5, 1878, *Robinson*, Q.C., shewed cause. The deed of the land to the defendant has been registered, and he has never tendered back a conveyance to the plaintiff. The title is in the defendant, and the plaintiff is entitled to his purchase money. What took place here constituted a delivery of the mortgage by the defendant to the plaintiff's assignors. The defendant employs

the solicitors to act for him in carrying out the transaction, and hands them the mortgage, and they in the defendant's interest deliver the mortgage to the plaintiff, and receive the deed. The position of the parties was changed, and the defendant cannot now repudiate the transaction.

J. B. Clarke, contra. There never was any delivery of the mortgage by the defendant. He handed it to his solicitors undated, with express instructions that they were not to hand it over without his consent, and until he was satisfied as to the title; and the solicitors, without any consent or approval, filled in the date, and handed it over to the plaintiff. The mortgage was delivered to the solicitors as an escrow, and the conditions upon which it was delivered never having been performed, it never became a complete deed: *Murray v. Earl of Stair*, 2 B. & C. 82, 86; *Hibblewhite v. McMorris*, 6 M. & W. 200. It has been held that even the delivery to the solicitor of the grantee of an instrument executed by the grantor, will not convert the instrument from an escrow into a deed, provided the delivery is of a character negating its being a delivery to the grantee: *Watkins v. Nash*, L. R. 20 Eq. 262.

June 28, 1878. HAGARTY, C. J.—Neither party called Mr. Hagart, who could have fully cleared up any difficulty in the proof.

We think there was evidence to shew that the defendant was cognizant of his solicitors' dealings with the plaintiff, and that the proper conclusion to be drawn from the whole evidence is, that authority was in fact given to Mr. Hagart to deliver the mortgage, when in his discretion, as the defendant's legal adviser, he thought his client's interests required or admitted his so doing.

On the faith of his acts on the defendant's behalf, the parties wholly altered their position. A conveyance was executed and delivered, vesting the title in the defendant, and the encumbrances were discharged and title cleared on the registry before the defendant thought proper to quit the

possession which he had enjoyed for nine months. He asks now to have all this rendered apparently abortive. His legal adviser seems to have fully protected his interests, and he has obtained the estate for which he bargained. Any complaint he might have against the Grants as to completion of buildings, could be settled elsewhere.

As jurors, we should certainly find that the mortgage was legally delivered, and is a binding security.

It would be very hazardous for solicitors to deal with each other in conveyancing matters if, on such evidence as the defendant here offers, the settlement of interests in lands, delivery of deeds and clearing off encumbrances, should all prove abortive as done without authority.

GWYNNE, J., concurred.

Rule discharged.

THE CONSOLIDATED BANK OF CANADA V. CAMERON
EXECUTRIX, &C.

Sci. fa.—Assets quando acciderint—Lands.

A *sci. fa.* upon a judgment of assets *quando acciderint* must not pray execution of assets generally, but only of such assets as have come to the executor's or administrator's hands since the recovery of the judgment.

A *sci. fa.* on a judgment against defendant as executrix under the will of C. deceased alleged that lands as well as goods and chattels had come to the defendant's hands as such executrix to be administered, and prayed execution thereon.

Held, that the lands of which the testator died seized did not become assets in the hands of the executrix to be administered; and there being no evidence of any goods and chattels having so come to the defendant's hands as such executrix, a verdict was entered for the defendant.

The Court intimated that the plaintiffs could obtain execution against the lands in the ordinary way.

THIS was a proceeding by *scire facias*, setting forth that by a judgment recovered in this Court upon the 10th day of November, 1877, the plaintiffs recovered against the

defendant, as executrix of the last will and testament of Malcolm Cameron, deceased, the sum of \$3,073.73, to be levied of the goods and chattels which were of the said Malcolm Cameron, deceased, at the time of his death, which should thereafter come to the hands of the defendant, as executrix aforesaid, to be administered; and alleging that after the judgment aforesaid divers lands and goods and chattels, which were of the said Malcolm Cameron, deceased, at the time of his death, to the value of the said \$3,073.73, had come to and were now in the hands of the said defendant, as executrix aforesaid, to be administered; and the plaintiffs prayed execution thereon.

The defendant appeared and pleaded that since the judgment in the declaration mentioned, no lands, goods or chattels, which were of the said Malcolm Cameron, deceased, came to the hands of the defendant, as executrix aforesaid, to be administered as alleged.

Issue was joined thereon.

The case was tried before Galt, J., without a jury, at Toronto, at the Spring Assizes of 1878.

At the trial the plaintiffs wholly relied upon the fact that the deceased, Malcolm Cameron, died seized of divers lands, but no evidence was offered of any goods, chattels or personal estate of any description, having come to the hands of the defendant, as executrix, to be administered since the recovery of the judgment against her.

Upon this state of facts the learned Judge was of opinion that the defendant was entitled to a verdict, but by arrangement with counsel for the plaintiff a nonsuit was entered, with leave reserved to the plaintiffs to move against it.

In Hilary term, February 4, 1878, *J. K. Kerr*, Q. C., obtained a rule to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiffs for the sum of \$3,115.98, being \$3,073.73, the amount of the judgment mentioned in the pleadings, and upon which the action was founded, with interest thereon.

In this term, May 29, 1878, *Osler* shewed cause. The defendant's plea was proved. There was no evidence of any goods or chattels having come into the defendant's hands as the executrix to be administered since the recovery of the judgment, and the cases are clear that lands of which a testator dies seized, do not become assets in the hands of the executor to be administered. The whole proceeding is, moreover, unnecessary, as the plaintiff could have obtained execution against lands in the ordinary way: *Mason v. Babington*, 17 C. P. 142.

J. K. Kerr, Q.C., contra. *Kelly on Sci Fa.*, 2nd ed., 26, 60, 94, and *Foster on Sci Fa.*, 174, 367, shew that upon judgment of assets *quando a sci fa.* is the proper remedy. The writ of *sci fa.* is nothing more than a writ of revivor. The moment judgment is signed lands, or the money arising from the sale thereof, or goods, become available as assets in the hands of the administrator for the payment of debts. This is expressly laid down in *Mein v. Short*, 9 C. P. 247. See also *Holton v. Macdonald*, 12 C. P. 246; *Hogan v. Morrissy*, 441. Even if the execution could have been obtained in the ordinary way, there is nothing to prevent the plaintiff proceeding by way of *sci. fa.*

June 28th 1878. GWYNNE, J.—The *scire facias* upon a judgment assets *quando acciderint*, must only pray execution of such assets as have come to the defendant's hands since her former judgment; and if it pray execution of assets generally, it cannot be supported: 2 Tidd, 9th ed., 1113; *Mara v. Quin*, 6 T. R. 1; 1 Wms. Saund., ed. 1871, 610. And proof of the executors receiving assets is always at the trial confined to a period subsequent to the judgment: 2 Wms. on Executors, 7th ed., 1954, 1966, 1980.

In this *scire facias* the plaintiff alleges that since the former judgment divers lands, as well as goods and chattels of the testator, have come to the hands of the defendant, as executrix, to be administered; but *Mein v. Short*, 9 C. P. 244; *Holton v. Macdonald*, 12 C. P. 246; and

Hogan v. Morrissy, 14 C. P. 441-2, shew that lands whereof a testator dies seised do not become assets in the hands of the executor or administrator to be administered. And if they were such assets, the plaintiffs would not, in this case, be advanced a whit, for they are no more assets in the hands of the executrix to be administered since the former judgment than they were before.

It was urged before us upon the authority of a passage in the judgment of Robinson, C. J., in *Gardner v. Gardner*, 2 O. S. 520, quoted in *Mein v. Short*, 9 C. P. 244, at p. 247, that upon judgment assets *quando acciderint* being recovered against the executrix *eo instanti* the land of the testator became assets in the hands of the executrix.

The language of the Chief Justice, at p. 247, is: "If the plaintiff were looking to the goods for his remedy, he could only answer a plea of *plene administravit* by shewing goods and chattels within the jurisdiction over which the administration that has been granted to the defendant extends. But with respect to the real estate, it is by statute, not by the act of the surrogate Judge, made legal assets for the satisfaction of debts and assets liable to the same legal remedy as goods and chattels. It becomes assets when the debt is made out by the judgment."

It is upon this last sentence that the counsel for the plaintiffs relied; but the Chief Justice in the above passage is plainly pointing out the distinction between goods and chattels, which are assets in the hands of the personal representative in virtue of the jurisdiction which grants administration, and real estate, which is made assets by statute, and is capable of being reached by an execution as goods and chattels are, although not assets in the hands of the personal representative to be administered.

The Chief Justice, to make quite clear that this is his object, adds, "The administrator never could, and never can, administer the real estate."

If the defendant had pleaded to this *scire facias* merely that no goods or chattels of the testator had since the former judgment come to her hands to be

administered, it would, in my judgment, have been sufficient, notwithstanding the allegation as to lands contained in the *scire facias*. But she has pleaded that neither lands, goods, nor chattels, have come to her hands since the former judgment, and as lands are not in her hands to be administered at all, and there is no evidence of any goods and chattels having come to her hands since the former judgment, the verdict should be entered for the defendant.

The nonsuit will be set aside and a verdict entered for the defendant, and the plaintiffs can, without the aid of a *scire facias*, as in the case of assets *quando acciderint*, obtain execution against the testator's lands by the ordinary course of proceeding.

HAGARTY, C. J., concurred.

Rule accordingly.

THISTLE V. THE UNION FORWARDING AND RAILWAY
COMPANY.

*Lease—Covenants to repair generally and after notice—"Accident by tempest"—
Action by assignee—Continuing breach.*

A lease of a wharf or pier, for eight years, dated 7th May, 1874, contained covenants by the defendants, the lessees, to repair generally, "reasonable wear and tear, and accidents by fire and tempest excepted;" and to repair after notice in writing, but without the above exceptions. In May, 1876, the wharf was damaged by the action of the ice forced against it by a high wind. In July, 1876, the demised premises were sold to the plaintiff under an execution against the lessors, and a deed thereof executed by the Sheriff in July; and in November the plaintiff gave a written notice to repair the damage caused as aforesaid. In an action by the plaintiff against the defendants for the breach of the covenants to repair generally and after notice.

Held, that the non-repair was a continuing breach of the covenants to repair, of which the plaintiff, as assignee, might avail himself.

Held, also, that the covenant to repair after notice was subject to the same exceptions as were contained in the general covenant.

Held, also, that the damage here sustained could not be said to be an accident caused by tempest, so as to bring it within the exception.

THIS was an action for breach of the covenants contained in a lease to repair generally the demised premises, and to repair after notice.

The cause was tried before Galt, J., without a jury, at Pembroke, at the Spring Assizes of 1878.

The lease was put in, and was between the Pembroke Pier and Dock Company and the defendants, and was for eight years from the 7th of May, 1874.

The clauses in the lease, which it is necessary to refer to are as follows:

"The said parties of the second part" (the lessees) "for themselves, their successors and assigns, do hereby covenant with the said parties of the first part," (the lessors) "their successors and assigns, that they shall and will, from time to time, and at all times during the said term, keep in good and sufficient repair the said premises hereby demised, reasonable wear and tear and accidents by fire and tempest excepted; and the same so kept in repair, shall and will at the end, expiration or other sooner determination of the said term, peaceably and quietly yield and deliver

up to the said parties of the first part, their successors and assigns," &c.

"And also that it shall be lawful for the said parties of the first part," (the lessors) "their successors and assigns," &c., "from time to time," &c., "to enter upon the said demised premises and every part thereof, to view and examine the state and condition thereof; and in case any want of reparation or amendment be found on any such examination, they the said" lessees, &c., "shall and will, from time to time, cause the same to be well and sufficiently repaired and amended and made good within one month after notice in writing shall have been given to them," &c.

"And if the said parties of the second part," (the lessees) "their successors and assigns, shall fail in making the necessary repairs in manner hereinbefore described, that it shall be lawful for the said parties of the first part," (the lessors) "their successors and assigns, to enter into and upon the said hereby demised premises, and have the same repaired in a proper manner," &c.

On the 11th of July, 1876, the premises were sold to the plaintiff, under an execution against the lessors, dated 4th June, 1875, and delivered on the same day to the Sheriff, and on 25th of July, 1876, the Sheriff executed a deed thereof to the plaintiff.

The damage had been done to the wharf or pier in the preceding May, by the action of ice forced against it.

On the 24th of November, 1876, the plaintiff served a written notice on the defendants to have the premises repaired.

The additional evidence, so far as material, is set out in the judgment.

For the defendants it was objected that it was not shewn that any damage had been done since the plaintiff became assignee; and that the injury was caused by a cause within the exceptions contained in the lease.

The learned Judge was of opinion that the defendants were protected by the exceptions in the lease, and in deference to the learned Judge's opinion, but not assenting

to it, the plaintiff accepted a nonsuit, leave being reserved to him to move to have the verdict entered for him for \$775, if the Court should be of opinion, on the whole case, that the plaintiff was entitled to succeed.

In this term, May 23, 1878, *Robinson*, Q. C., obtained a rule *nisi* to set aside the nonsuit, and to enter a verdict for the plaintiff pursuant to the leave reserved, and under the Law Reform Act.

During the same term, June 5, 1878, *J. K. Kerr*, Q. C., shewed cause. The first point is, that the plaintiff cannot recover in respect of a breach of the covenants to repair, for damage occurring previous to his becoming the assignee of the reversion. In *Johnson v. Churchwardens of St. Petlr's, Hereford*, 4 A. & E. 520, 526, it is expressly laid down that a lessee is not liable for breach of the covenant to repair committed before the purchase by the plaintiff of the reversion. See also *Martyn v. Williams*, 1 H. & N. 817; *Woodfall* on L. & T., 11th ed., 233: Assuming, however, that there can be such recovery, then there has not been a breach of the covenants, the damage coming within the exceptions, namely, being caused by tempest, which was the proximate cause of the injury; and although the covenant to repair after notice did not contain the exception, it must be deemed to be equally subject thereto.

Robinson, Q. C., contra. The plaintiff claims under a sheriff's deed made in pursuance of a sale under an execution issued and delivered to the plaintiff previous to the occurrence of the damage herein; and the plaintiff is entitled to all the judgment debtor's rights at the time of the issue of the execution: R. S. O. ch. 154, sec. 29. The breach of the covenants to repair is a continuing breach, for the lessee is bound to repair from time to time, and at the end of the term to deliver up the demised premises in good repair: at all events the plaintiff is entitled to recover for the breach of the covenant to repair after notice: *Hicks v. Downing*, 1 Ld. Raym. 99, 1 Salk. 13; *Taylor* on L. & T., 5th ed., p. 264, sec. 362; *Woodfall* on L. & T., 11th ed., 233;

Platt on Leases, 184, 361; *Platt* on Covenants, 516, 526; *Chitty* on Contracts, 11th Amer. ed., 1398. The case of *Churchwardens of St. Peter's, Hereford*, 4 Ad. & E. 520, is distinguishable. The damage here did not come within the exceptions. It was not a damage caused by tempest; and this clearly appears from the definition of tempest given in the dictionaries. Also, under the covenant it must be an *accident* caused by tempest; if it is the ordinary result of a tempest it does not come within the exception: *Fenwick v. Schmalz*, L. R. 3 C. P. 313. The two covenants, however, are separate and independent covenants, and the latter covenant, namely, to repair after notice, cannot be deemed to be subject to the exception contained in the general covenant: *Woodfall* on L. & T., 11th ed., 151-2; *Doe dem. Morecraft v. Meux*, 4 B. & C. 606; *Baylis v. Le Gros*, 4 C. B. N. S. 537, 552; *Few v. Perkins*, L. R. 2 Ex. 92; *Coward v. Gregory*, L. R. 2 C. P. 153; *Leith's Real Prop. Stats.*, 110; *Taylor* on L. & T., 5th ed., p. 264, sec. 362; *Wallbridge v. Everitt*, 22 C. P. 28; *Kling v. Dress*, 5 Rob. N. Y. 521, 527.

June, 28 1878. HAGARTY, C. J.—On the argument, it was first urged by Mr. Kerr, that the plaintiff could not recover, all the damage claimed being incurred before he had acquired any interest in the reversion.

To this it was answered by Mr. Robinson, that it was a continuing breach: that the lessees were bound to keep in repair from time to time, and to deliver up in good repair at the end of the term; and also that here there was a covenant to repair on notice.

This answer is, I consider, sufficient.

The law is very fully stated in *Coward v. Gregory*, L. R. 2 C. P. 153; and the difference between a covenant by lessor to *put* premises in complete repair, and to repair and keep in repair, is fully pointed out. See also *Woodfall* on L. & T., 11th ed., 233.

The question remains whether the damage came within the exceptions.

Mr. Robinson urged that the covenants to repair generally, and to repair on notice, were separate and independent covenants; and that in the latter (to repair on notice) there was no such exception.

They are, doubtless, independent covenants for some purposes. For example, where there is a proviso for re-entry on breach of covenants generally, non-repair is a complete forfeiture without any notice; and after giving the notice to repair in the named time, the lessor might bring an action on the general previous covenant.

The law is reviewed in *Baylis v. LeGros*, 4 C. B. N. S. 537, 549; *Woodfall* on L. & T., 11th ed., 152.

But no authority has been cited to shew that the subsequent covenant to repair on notice is not also qualified by the exception. We think it is. The first covenant specifies the repairs that the lessees agree to do, and we think it would be a perversion of the meaning of the parties if the giving of a notice should enlarge the character of the repairs previously limited.

As is said in *Platt on Covenants*, 364, "In order to admit of the qualifying language of the one covenant being considered as virtually transferred to and included in the other, it appears that they should be connected covenants, of the same import and effect, and directed to one and the same object."

This is quoted with other authorities, in *Austin v. Ferguson*, 25 U. C. R. 273. See especially the language of Dallas, C. J., quoted at the same page, and *Gainsford v. Griffith*, 1 Wms. Saund., ed. 1871, 83; as to making the construction by comparing the covenants each with the other, and on the whole deed.

We have therefore to consider whether this damage comes within the exception.

The form of lease used here is that of a house lease, and unfortunately the parties did not provide in terms for the very probable injuries to arise from ice to a wharf built out from the shore into the lake or bay.

It is an open bay on the Ottawa, without currents of any moment. The formation of ice-fields in such a locality

is, we understand, the regular result of the severe winters of that region.

In May, 1876, the water in the bay was unusually high, higher, as some witnesses said, than they had seen in previous seasons. A strong wind was blowing from the north into the bay. "The ice was driven in by the wind. The wind was very strong that drove it in, because it shoved pretty hard. The water rose before the ice gave way under the wharf, and consequently it either broke the braces or drew the piles when it arose. Some years the ice shoves; some years it does not. The ice was very firm under the wharf and round the piles. When the ice shoved it would break the piles, and it was by the raising of the ice the piles were drawn. The wharf was damaged by both these means. . . . The ice shoved and upset the piers and spiles. . . . It was a high wind."

Another witness says, "The ice came down with a squall of wind. I never saw the ice shoved in so wicked as that. The ice was not broken; the whole body of ice came down and shoved bodily. There was water on the top of the ice two feet—this was under the wharf. I saw the ice rising and drawing piles, and breaking braces. It was on the same day after the ice stopped shoving. The shoving continued for a minute, or a minute and a half, or two minutes. It was from an hour or two hours after the ice rose."

Another witness says, "A high wind caused the ice to come in. It was an unusual thing for the ice to come in with such force. The ice was very strong. I never saw the water so high."

Another witness says, "It was done by the ice shoving and also by the ice raising under the piers; then owing to the extraordinary height of the water that spring, the wharf was wrecked." Again, "It was blowing pretty hard."

Can this be called damage from "tempest?"

The most direct action of tempest would be its own force, overthrowing or unroofing buildings, &c.

I think that a violent storm dashing the waves against

this wharf, and injuring it by their direct impact, would, in the ordinary understanding of parties, be an injury from "tempest."

But the ordinary wear and tear from the action of the water, more or less injurious according to the state of the weather, would fall expressly within the exception in the lease as "reasonable wear and tear."

An "accident by tempest" is provided for as a separate contingency, and must mean something very different.

I think it impossible to contend on this evidence that there was any thing in the nature of a "tempest" to have injured the wharf by the action of the waves, apart from the presence of an ice field.

There would have been nothing to have occasioned any damage of an unusual kind.

It is not necessary to confine injuries from "tempest" to the mere violence of waves. If a disabled or abandoned vessel be dashed by the violence of a storm against a wharf to its damage, I think that would be within the exception. A vessel coming in contact with the wharf from the carelessness or mismanagement of the crew, although in a sense driven against it by action of wind or water, would not, as I believe, come within the exception. The storm or tempest must be, as it were, the overruling force.

I find a great difficulty in holding that the mere ordinary drifting or floating of inanimate objects, acted on by ordinary winds against a wooden wharf, and causing damage thereto, would come under the head of "accident by tempest."

In this Allumette lake or bay the constant presence of ice-fields in winter must be as well known as in our Toronto harbour. It is the exception in winter to find any land-locked bay or lake to be free of ice. We know that an ice field shoves with enormous force: that when loosened in the spring at its edges, it floats about, propelled by any prevalent wind: that a storm or tempest is not required to cause it to drive against the shore or a wharf or warehouse with destructive violence.

When people are contracting with reference to a building or wharf within reach of ice fields, and the tenant desires to protect himself, the subject of injury from ice would probably suggest itself.

Here, if I may hazard an opinion, it seems to me this important matter was probably forgotten. Fire and tempest were provided for. I cannot believe that the ordinary pressure of ice shifting with the direction of the wind, was contemplated under the word "tempest."

In the notes to *Vicars v. Wilcocks*, 2 Sm. L. C., 7th ed., 534, the rule is thus stated, at p. 549: "Where the contract is to do, or refrain from doing, some particular thing, * * the party in default shall be held liable for all losses that may fairly be considered as having been *in the contemplation of the parties* at the time when the agreement was entered into."

"*In jure, non remota sed proxima causa spectatur*," is the well known maxim: *Broom's Legal Maxims*, 4th ed., 215-23.

It must be the *causa causans*, and not merely a *causa sine qua non*."

Lord Bacon's *Maxims*, *reg. 1*, "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."

The subject of proximate and remote causes is very fully discussed in certain insurance cases.

Ionides v. Universal Marine Ins. Co., 14 C. B. N. S. 259, contain very elaborate arguments on the authorities.

Willes, J., at p. 289, speaks of "the ordinary rule of insurance law, that, in ascertaining the relative rights of the parties, you are not to trouble yourself with distant causes, or to go into a metaphysical distinction between causes efficient and material, and causes final; but you are to look exclusively to the proximate and immediate cause of the loss."

In *Everett v. London Assurance Co.*, 19 C. B. N. S. 126, the plaintiff was insured against fire. There was a gun-

powder explosion half a mile off. His windows and window frames, and the structure generally, were damaged by the atmospheric concussion caused by the explosion. The policy contained a provision to include losses by lightning, provided the property had been actually set on fire thereby. The Court held that the loss was not covered.

Willes, J., said, at p. 133: "We are bound to look to the immediate cause of the loss or damage, and not to some remote or speculative cause. Speaking of this injury, no person would say that it was occasioned by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere. It would be going into the causes of causes to say that this was injury caused by fire to the property insured."

Byles, J., said that the words must be understood in their plain and ordinary sense.

Marsden v. City and County Assurance Co., L. R. 1 C. P. 232, 235, is to the like effect, the proximate, not the remote cause, being regarded.

We may also refer to *Sharp v. Powell*, L. R. 7 C. P. 253; *The George and Richard*, L. R. 3 Ad. & Ec. 466; *Bailiffs of Romney Marsh v. Corporation of Trinity House*, L. R. 5 Ex. 204, 7 Ex. 247; *Taylor v. Dunbar*, L. R. 4 C. P. 206; *Mayne on Damages*, 2nd ed., 40.

The word "tempest," has an undoubtedly plain popular meaning and significance, however varying that may be, from its apparent root "tempus," "temps," "tempestive," "intempestive, tempestas," time, weather generally, seasons and seasonable, &c. The modern meaning being universally "An extensive current of wind, rushing with great velocity and violence. * * A storm of extreme violence. We usually apply the word to a steady wind of long continuance; but we say also of a tornado, it blew a tempest. The currents of wind are named, according to their respective degrees of force or rapidity, a *breeze*, a *gale*, a *storm*, a *tempest*; but *gale* is also used as synonymous with *storm*, and *storm* with *tempest*:" *Imperial Dictionary*.

On the evidence in this case I draw the conclusion that

the damage done here was not done by "tempest," or was not an "accident by tempest" in the words of the lease : that there was in fact no "storm" or "tempest," (as such words are universally understood) existing at the time the damage accrued, or acting as the cause thereof, either proximate or remote : that the damage was caused by the action of ice at a time of unusually high water, and that such action or movement of the ice was the natural result of ordinary winds and weather ; a casualty to be guarded against by words pointing thereto by contracting parties.

There was no pretence whatever for asserting that any injury to the wharf took place from the direct effect of winds or waves, apart from the drifting or "shoving" of an ice field.

I think the rule should be absolute to enter a verdict for the plaintiff for \$775.

GWYNNE, J., concurred.

Rule absolute.

CAMPBELL V. SPURGEON.

Sale of land subject to mortgage.

In 1856, C. mortgaged some ten acres of land to H. for £2,000, and H. covenanted, on request by C. or his assigns, and on payment of a specified rate per acre, to release any portions of said land. Subsequently C. sub-divided the land into a number of small lots, and on the 2nd of January, 1857, sold two of these lots to defendant for £93 15s., C. agreeing to pay off and indemnify and save harmless the defendant from the mortgage to H. The defendant paid £20 down, which C. agreed to apply on the mortgage, but never did, and defendant gave back a mortgage to C. for £73 15s., the balance of the purchase money. In February, 1857, C. assigned defendant's and six similar mortgages to one H. as collateral security for two promissory notes made by C. for £100 each, payable at four and eight months respectively, on payment whereof the mortgages were to be given up; and, so far as appeared, these notes might have been paid. C. not having paid any of the principal money of H.'s mortgage, on the 20th January, 1866, executed an indenture, whereby after reciting such non-payment of said principal money, &c., he, in consideration of his discharge from the mortgage indebtedness, released all his equity of redemption and estate in the mortgaged premises to the executors and trustees of the will of H., who had since died, the indenture being declared to be made under the Act entitling mortgagees to receive such release without merging the mortgage debt, and that it was only to operate as a release of such debt against C., and not against said lands or subsequent incumbrances. On the 10th of January, 1867, by an indenture, which, after reciting C.'s mortgage to H. and his said covenant therein, and a Chancery suit in which the Court had directed a sale of C.'s mortgage upon which said principal was due as aforesaid, the said trustees, by the conveyance, the terms of which were settled by the parties, in consideration of \$100, granted and conveyed to S., his heirs and assigns, the defendant's and forty-three similar lots in which the equity of redemption had been sold by C. as aforesaid, subject to such equity of redemption as was then subsisting therein; and the said trustees did thereby purport to assign to S. the mortgage debt and interest payable and chargeable on said lots under H.'s covenant and all benefit therefrom; and for better enabling S. to recover such portions from C. or any persons entitled to pay the same, they appointed him their attorney. S. then conveyed to one Chambers, and Chambers's personal representatives conveyed to H. In an action by plaintiff as assignee of H. of the defendant's covenant in his mortgage to C. to pay the £73 15s.: *Held*, that after the execution of the indenture of the 20th February, 1866, C. would not, in equity, be permitted to recover, and the plaintiff, claiming as his assignee, could be in no better position; and that the subsequent conveyances did not confer any new right.

DECLARATION: that the defendant by deed, dated the 2nd day of January, 1857, covenanted with one Joshua Crawford to pay to him the sum of £73 15s., with interest at the rate of 6 per cent. per annum: that Joshua Crawford by deed assigned the same to one J. J. Hunter, who by deed assigned the same to the plaintiff, who is now the

assignee of the said deed and covenant, and of the debt secured thereby; and that the defendant hath not paid the same or any part thereof.

The defendant, besides denying the making of the deed of covenant and the assignments, pleaded a special plea by way of equitable defence, to the effect that on the 2nd of January, 1857, he entered into an agreement with Joshua Crawford for the purchase of two small pieces of land at the price of £93 15s., of which he paid £20 in cash, and the balance of £73 15s. was agreed to be paid at a future day with interest: that at that time the premises so agreed to be sold, together with others, were mortgaged to one Hannah for securing £2,000 with interest: that one of the terms of the defendant's agreement to purchase was that Crawford should pay off the said mortgage for £2,000, and indemnify and save harmless the defendant therefrom, and that upon the faith of such promise the defendant agreed to purchase the two small pieces: that thereupon Crawford executed a deed of the said two small pieces to the defendant, and therein covenanted to protect and save harmless the defendant from the mortgage to Hannah, and to pay off the same as it should become due: that Crawford, however, never did pay anything, either on account of interest or principal secured by the said mortgage, but therein wholly made default, and afterwards, on the 20th of February, 1866, he released to the trustees of the will of said Hannah, who was then deceased, his equity of redemption in the said lands, who thereby released him from the said mortgage debt: that the defendant has never had possession of the pieces so agreed to be purchased by him from Crawford, and has lost the £20 he paid to Crawford, and that the trustees of Hannah's will since such release to them by Crawford sold the same to one Sampson, who sold them to one Chambers, who thereupon entered into possession of the said lots, and who has since died intestate, leaving heirs him surviving, who are now in possession of the said lots; and under these circumstances the defendant submits that the plaintiff is not entitled to enforce payment

by the defendant of his covenant in the declaration mentioned.

Upon this plea the plaintiff simply joined issue.

The whole case turned upon the proper construction to be put upon certain deeds proved and admitted at the trial, the nature of which, so far as material, appear in the judgment.

The cause came down for trial at Toronto, before Armour, J., without a jury, who rendered a verdict in favour of the defendant, finding the above plea of the defendant to be true in fact.

In Easter term, May 28, 1878, *T. S. Kennedy* obtained a rule *nisi* under the Law Reform Act, to set aside the verdict for the defendant and to enter a verdict for the plaintiff.

During the same term, June 3, 1878, *J. E. Rose* shewed cause. The defendant's plea not having been demurred to is admitted to be good, and therefore if proved constitutes a good defence to the action. The evidence submitted at the trial proved the plea, and the learned Judge has so found, and in consequence entered a verdict for the defendant. Moreover the legal estate is in the heirs at law of Chambers, so that it did not pass under the deed executed by his personal representatives. The plaintiff is not in a position to convey it to the defendant; and therefore cannot maintain the action: *Henderson v. Brown*, 18 Grant 79; *Gowland v. Garbutt*, 13 Grant 578; *Parkinson v. Higgins*, 37 U. C. R. 308, 40 U. C. R. 274.

T. S. Kennedy, contra. The plea was not proved. Neither Hannah, nor his executors, nor Chambers ever went into possession of the land, nor was the land ever sold to Sampson or Chambers, for under the conveyances only a mortgage interest passed. The Hannah mortgage expressly provided for a release of the defendant's lots on payment of so much per acre, and the amount due on the defendant's mortgage is and always was more than sufficient to obtain this release. The plaintiff's beneficial interest in the lands is to receive the balance after deduct-

ing the amount necessary to discharge the first mortgage : *Davis v. White*, 16 Grant 312. The defendant cannot set up the Hannah mortgage as a defence, as he has always been in a position on payment of less than the amount covenanted to be paid by him to have it released, and such payment would be a defence *pro tanto* to this action. The Hannah mortgage was registered, and the defendant claiming under a registered title had notice of this right: *Palmer v. Hendry*, 27 Beav. 349; *Gowland v. Garbutt*, 13 Grant 578; *Burnham v. Galt*, 16 Grant 417; *Munsen v. Hans*, 22 Grant 279, 280; *Tully v. Bradbury*, 8 Grant 561; *Henderson v. Brown*, 18 Grant 79. The indenture of release from Crawford to the Hannah executors did not in any way affect the lands in defendant's mortgage, as it purported only to deal with Crawford's equity of redemption, and he had no such interest therein. Crawford had an equity of redemption in the bulk of the lands mortgaged to Hannah, and this alone passed by the release. The assignment to the plaintiff conveyed the legal estate to him; at all events he has the right to call for a conveyance of the legal estate, and the matter is purely one of conveyancing. The defendant should have set up this defence by his plea, when Hunter could, if necessary, have been made a party to the suit. It was incumbent on the defendant to have made him a party, if necessary.

June 28, 1878. GWYNNE, J.—By an indenture of mortgage, bearing date the 29th day of August, 1856, one Joshua Crawford conveyed to one William Hannah ten acres of land therein described in fee simple, subject to redemption upon payment by Crawford of the principal sum of £2,000 currency, in manner following, that is to say: the interest at six per cent. half-yearly for five years, then payment of £1,000, part of the principal, thenceforth interest at the rate of ten per cent. upon the remaining sum of £1,000 until paid, which it was declared it might be at any time within the second period of five years. The mortgagee, Hannah, covenanted in the mortgage “to sign

a release of any portion of the above mentioned premises when required so to do by the mortgagor, his heirs, executors, administrators or assigns, upon being paid at the rate of £325 per acre, all the releases and expenses to be paid by the mortgagor, his heirs, executors, administrators or assigns." After the execution of this mortgage, the mortgagor, Crawford, had the land, which was thereby mortgaged, surveyed and subdivided, and laid out into smaller lots. And by an indenture, dated the 2nd of January, 1857, expressed to be made in consideration of £93 15s., paid to him by the defendant, he conveyed to defendant two of such smaller lots, described as being lots Nos. 96 and 97 on a plan of building lots adjoining the Don Mount, made by J. O. Browne, P. L. S., for the said Crawford, to have and to hold to the defendant, his heirs and assigns for ever, subject to the mortgage executed by Crawford to Hannah, which Crawford by the deed to the defendant agreed to pay off and satisfy as the same should become due.

The effect of this deed was that thereby Crawford transferred to the defendant absolutely all equity of redemption remaining in him in so far as affected these lots Nos. 96 and 97, part of the land mortgaged by Crawford to Hannah, and also all benefit of Hannah's covenant contained in that mortgage as to releasing therefrom these lots Nos. 96 and 97, upon payment by the defendant at the rate of £325 per acre. Upon the execution of the deed from Crawford to the defendant, the latter paid Crawford £20, part of the consideration money, which, as was sworn by the defendant, Crawford agreed to apply towards relieving the lots Nos. 96 and 97 from the mortgage to Hannah; and on the same day the defendant executed a mortgage upon the lots 96 and 97 to Crawford, whereby the defendant covenanted to pay the balance of the consideration money, viz., £73 15s., on the 30th September, 1861, and interest thereon at the rate of six per cent. half yearly in the meantime.

On the 17th February, 1857, (in the deed it is said 1856,) Crawford assigned to one Hunter the above

mortgage of the defendant, and also six other similar mortgages executed by other persons upon eleven other similar lots laid out by Crawford and sold by him to divers purchasers in like manner (these seven mortgages containing covenants in the whole for payment to Crawford of £489 13s. 6d.) as collateral security for payment by Crawford of two several promissory notes for £100 each made by Crawford, payable to one Hamilton, and endorsed by Hamilton and one Arthur Crawford, and held by Hunter, the one of such notes being made payable at four months and the other at eight months; and it was thereby provided that four of the above mortgages (not including the defendant's) should be given up by Hunter upon payment of the first note, and the three others, including the defendant's, upon payment of the second.

On the 20th February, 1866, an indenture was executed between the said Joshua Crawford of the one part, and James Leask and James Dick of the other part, whereby—after reciting the indenture of mortgage from Crawford to Hannah of the 29th August, 1856, the death of Hannah upon the 17th day of November, 1857, after having first duly made his last will and testament, whereby he made the said James Leask and James Dick, and one John McArthur, then deceased, and the survivors of them, executors and trustees of his said will, and that no part of the principal sum secured by the said mortgage from Crawford to Hannah had been paid, but that the whole amount thereof, together with a large amount for interest, was still due and owing, and the inability of Crawford to pay the said principal sum and arrears of interest, and that he had proposed to release to the said Leask and Dick, as executors and trustees of said Hannah's will, his, the said Crawford's equity of redemption, and all other his estate in the said mortgaged premises under and by virtue of the said indenture of mortgage or otherwise howsoever, upon condition that he, the said Crawford, should be discharged from his said mortgage indebtedness, and from a judgment recovered in the Court of Common Pleas for Upper Canada

on the 12th day of August, 1857, for £113 12s. 4*d.*, against him and his son Arthur on a promissory note given for part thereof—it was witnessed that, in consideration of the premises and of the release therein contained by the parties thereto of the second part, Leask and Dick, he, the said Crawford, did grant and relinquish and for ever quit claim and confirm unto Leask and Dick, and their heirs, as executors and trustees aforesaid, and their assigns, all and singular the said mortgaged premises, with their appurtenances, and all the estate, right, title, and interest, claim, and demand whatsoever of him, the said Crawford, in, to, out of, or upon the said mortgaged premises,—to have and to hold unto and to the use of the said Leask and Dick, as such executors and trustees aforesaid, and their heirs and assigns forever, freed and discharged of and from all benefit and equity of redemption whatsoever. And Crawford thereby covenanted to execute such further assurances as might be required; and he thereby also released to the parties to the said indenture of the second part all his claims upon the said lands; and the parties to the said indenture thereby declared that the said indenture was made in pursuance of the Act enabling mortgagees to receive a release of the equity of redemption without thereby merging the mortgage debt, and that it was only intended to operate as a release of such debt as against the said Crawford, and not against said lands or subsequent incumbrances.

Whether this latter clause was at all necessary, or whether its insertion made any difference whatever in the deed from what would have been its effect if the clause had been omitted, we need not, as it seems to me, enquire, for the material question with which we have to deal is, whether any, and, if any, what right after the execution of that indenture still remained in Crawford to enforce payment by the defendant of the £73 15*s.* which he covenanted to pay by the indenture of the 2nd of January, 1857?

Whether or not Hunter, upon the 20th of February, 1866, still retained any interest whatever in the defen-

dant's mortgage to Crawford, in virtue of the assignment of the 17th of February, 1857, did not at all appear. For all that appeared the notes held by Hunter, and for collateral security to which the mortgages were assigned, may have been long before paid and satisfied; but whatever interest, if any, Hunter then had in such collateral security, as it could only be asserted against the defendant in the name and in the interest of Crawford, all that is necessary is to determine what was the effect of the indenture of the 25th of February, 1866, upon Crawford's claim against the defendant.

The whole effect of Crawford's transfer to Hunter of Spurgeon's mortgage of his equitable interest under his purchase from Crawford, was to vest in Hunter the equitable right to recover in Crawford's name from Spurgeon, under his covenant with Crawford, whatever sum Crawford could himself recover to his own use; but Crawford himself would not have been permitted by a Court of Equity to recover to his own use from Spurgeon, if Crawford had utterly failed, as he had, to pay any part of the principal of that mortgage, and had so committed a breach of his covenant with Spurgeon, upon the faith of which the latter entered into his contract.

When then, up to February, 1866, Crawford for nearly ten years after his transaction with Spurgeon had failed to pay off any part of the principal, although one half of it was for years in arrear, and found himself to be utterly unable ever to pay it, and so utterly unable to keep his covenant with Spurgeon, and had not applied even Spurgeon's £20, as he had agreed, towards payment upon the lots Spurgeon had contracted for, it would be quite out of the question that Hunter could then have been permitted to recover to his own use in Crawford's name moneys only in equity payable to Crawford conditional upon the fulfilment by him of his covenant to pay off the mortgage, and which, if sued for by Crawford, the Court of Chancery, upon Spurgeon's application, would, if recoverable, have compelled to be applied in relief of Spurgeon's lots from

Crawford's mortgage under Hannah's covenant in that behalf; so that, independently of the fact that there is no evidence that the note, for the payment of which Spurgeon's mortgage was assigned as collateral security, was still due and owing to Hunter in 1866, Crawford's surrender of all his estate, title, interest, claim, and demand, in, to, upon, or out of the mortgaged estate, because of his acknowledged inability to pay the mortgage the whole of the principal of which, together with a large arrear of interest remained unpaid, was an act which Crawford might well execute without interfering with any right which he had transferred to Hunter, and under no circumstances could Hunter have been permitted to recover in Crawford's name moneys which, if paid to Hunter, would have left Spurgeon still liable to pay over again to Hannah's trustees, in order that he might obtain a title to that fee simple estate for which he had contracted with Crawford. Hunter, in fact, never had any beneficial interest in the money which Spurgeon had covenanted to pay Crawford. His interest, besides being merely collateral to the notes upon which Hamilton and Arthur Crawford were indorsers, which, for aught that appears, may have been paid to Hunter by some one of the parties thereto, was an interest conditional upon Crawford's fulfilment of his covenant with Spurgeon by paying off the mortgage to Hannah. It was an interest, therefore, of such a nature that Crawford could well extinguish and destroy its effect as against Spurgeon, in so far as any demand for the money in Crawford's name to Hunter's use is concerned.

Now the effect of the deed from Crawford to the defendant was to transfer to the latter all the former's equity of redemption in the lots 96 and 97, so far as that equity of redemption could be severed from Crawford's equity of redemption in the remainder of the premises mortgaged to Hannah. But for Hannah's covenant to release any portion of the mortgaged premises from the operation of the mortgage upon payment of £325 per acre, the defendant would have had no power of compelling Hannah to release these

lots 96 and 97 from the mortgage without payment of the whole mortgage debt. The claim which a purchaser of Crawford's equity of redemption in a part of the mortgaged premises had under and in virtue of Hannah's covenant was a claim wholly independent of the Statute which provides that releases of equities of redemption in mortgaged premises shall not operate as a merger of the mortgage debt, so as to enable a second incumbrancer to come in as first to the prejudice of a prior incumbrancer who had taken a release of such equity of redemption. The clause at the close of the indenture of the 20th February, 1866, seems to have no application to a person in the position of the defendant, unless it was inserted *ex abundanti cautela*, for the purpose of shewing that, notwithstanding the default which had been committed, the trustees of Hannah's will were advised, and being so advised, were willing to recognise the right of purchasers of parts of Crawford's equity of redemption to obtain releases of the pieces so purchased under the terms of Hannah's covenant in that behalf. The mortgage executed by the defendant was a mortgage only upon the estate, namely, the equity of redemption, conveyed by Crawford to Spurgeon. Crawford's title, therefore, in the lots 96 and 97 consisted in a conditional transfer of the equity of redemption in these lots which was vested in the defendant. Now the intention of the parties to the indenture of the 20th February, 1866, is, as it appears to me, clearly expressed to have been to extinguish all the estate, right, title, interest, claim, and demand whatsoever of Crawford into, out of, or upon every part of the mortgaged premises including these lots 96 and 97, and that in consideration of the discharge and extinguishment of the mortgage debt he released, relinquished, and forever quitted claim and confirmed unto the trustees of Hannah's will, and their assigns, the whole of the said mortgaged premises freed and discharged of all such interest claim, demand, &c., of Crawford himself; securing however, to the purchasers from Crawford of his equity of redemption in the small pieces sold to purchasers their right by

payment to Hannah's trustees to obtain the legal fee simple in these pieces under Hannah's covenant in that behalf.

Now, after the execution of this indenture, could Crawford,—who had agreed to indemnify defendant from the mortgage and had covenanted with him to pay it off, and upon the faith of that covenant had procured the defendant to make the covenant which he did make, and who, under the circumstances recited in the above deed, had procured himself to be released from the mortgage debt which he had covenanted with the defendant to pay, and who in consideration of such release had released as above all his claims, &c., of every nature whatsoever upon every part of the mortgaged premises—be permitted to recover from the defendant money which, upon the faith of Crawford's covenant to pay off the mortgage, the defendant had covenanted to pay him.

It is contended upon behalf of the plaintiff that inasmuch as the defendant by paying Hannah could at any time have obtained the benefit of Hannah's covenant, and thus have secured the legal title to the little lots, he should be still held bound to pay Crawford; but if the defendant had paid Hannah or his trustees before the execution of the deed of the 20th February, 1866, Crawford could not have been permitted to recover the same money over again from the defendant under his covenant, and after the execution of that indenture it was a matter of indifference to Crawford whether or not the defendant should pay Hannah's trustees or abandon also, as Crawford himself had, all estate, right, title, &c., in the property. Crawford could not sue on his covenant for the benefit of Hannah's trustees, who have no claim in law or equity to compel the defendant to pay them the money he had covenanted to pay to Crawford or any part of that sum. The defendant had the privilege of claiming a benefit under Hannah's covenant, but was in nowise liable to Hannah or his trustees as for a money demand, nor otherwise than upon a bill to be filed by them to extinguish his privilege under that covenant, unless he should within a reasonable time take advantage thereof by

payment to Hannah or his assigns. The defendant then only could obtain the fee simple in the lots 96 and 97 by payment to Hannah's assigns in the terms of Hannah's covenant in that behalf, whereas the plaintiff's claim made here through Hunter is asserted in a right adverse to these trustees, namely, in virtue of an assignment by Crawford before his surrender to Hannah's trustees of his equity of redemption.

It appears then to be clear that after the execution by Crawford of the indenture of the 20th February, 1866, Crawford could not be permitted in equity to recover from the defendant the amount covenanted to be paid to him, and that the subsequent deeds which were relied upon did not, and could not give to Crawford any new right; and therefore that as the plaintiff's claim is rested upon the assignment to Hunter, in 1857, whether the plaintiff sue in his own name or in Crawford's matters not, he cannot recover.

We may, however, refer to the subsequent deeds for the purpose of seeing where the estate in these lots 96 and 97, now is.

By the indenture of 20th February, 1866, the fee simple was vested in the trustees of Hannah's will, subject to the equitable claim of the defendant, if he chose to assert it under Hannah's covenant contained in the mortgage from Crawford to him, but the mortgage debt of Crawford became utterly extinguished, except as a shield against the action of subsequent incumbrancers under the statute.

By an indenture bearing date the 10th day of June, 1867—after reciting the mortgage from Crawford to Hannah, and Hannah's covenant therein contained, and a suit in Chancery by one Robert Pollock against Hannah's widow, and Hannah's will, and that Mrs. Hannah was entitled thereunder to an annuity of £400, and that Leask and Dick were devisees in trust of Hannah's will, and the singular recital that the Court of Chancery had in that suit authorized the sale of Crawford's mortgage to Hannah upon which, as appears by the recitals in the deed of the 20th

February, 1866, no part of the principal sum of £2000, had been paid, but that the whole thereof, with a large arrear of interest, was due, to one Sampson for the sum of one hundred dollars, and that the parties to the said indenture had settled amongst themselves the terms of the said indenture—it was witnessed that in consideration of the payment of the said sum of \$100 paid by Sampson, Leask and Dick granted and conveyed to Sampson, his heirs and assigns, not only the said lots numbered 96 and 97, but also forty-three other similar small lots, the equities of redemption in which had been in like manner sold by Crawford to divers other persons; to have and to hold the said lands and hereditaments, and all and singular other the premises thereby assigned, conveyed, and released, unto the said Sampson, his heirs and assigns for ever, subject nevertheless to such equity of redemption as is now subsisting in the same. And the said Leask and Dick did thereby purport to assign and set over unto the said Sampson, his executors, administrators, and assigns, all that portion of the said mortgage debt and interest payable in respect of and chargeable upon the said enumerated lots thereby assigned under and by virtue of the said covenant of Hannah, and all benefit to be derived therefrom; and for the better enabling the said Sampson, his executors, &c., to recover the said portion of the said mortgage debt, Leask and Dick nominated Sampson their attorney, to sue for, recover, and receive from the said mortgagor—*i. e.*, from Crawford or any persons liable to pay the same—the said portion of the said mortgage debt.

Now, laying aside the singular recital in this indenture, that the Court of Chancery had sanctioned the sale of a mortgage (upon which the principal sum of £2,000, with an arrear of interest, was due,) for the sum of \$100, let us deal simply with the operative part of the deed, and in construing that operative part we have to look to and give effect to the indenture of the 20th of February, 1866, which the indenture of the 10th of June, 1867, (the terms of which were settled by the parties thereto, and not by the Court,) wholly ignores.

Now it is to be observed that the effect of the deed of February, 1866, was wholly to extinguish the mortgage debt of Crawford to Hannah, in the sense that no part of that debt remained to be assigned to a purchaser of the mortgage. The operation therefore of the deed of the 10th of June, 1867, notwithstanding the recitals therein, was to convey the legal estate in the lots therein mentioned, including these lots 96 and 97, to Sampson in fee, subject however to such rights as the several purchasers from Crawford of his equity of redemption in those several little pieces had, under Hannah's covenant in Crawford's mortgage, to call for a conveyance to themselves of the legal fee upon payment to Hannah's estate of the amounts due by them, so that Sampson, as assignee of Leask and Dick, should hold these lots in like manner as Leask and Dick in virtue of the release executed by Crawford held them themselves. The clause making Sampson the attorney of Hannah's trustees to enforce payment of what are called portions of Crawford's mortgage debt, is simply nugatory, for that mortgage debt was already wholly extinguished, save only as a shield against the action of a subsequent incumbrancer under the statute, and it would be erroneous to call the amounts which purchasers from Crawford agreed to pay him "part of the mortgage debt of Crawford" in the sense of being recoverable as such, even if the mortgage debt had not been extinguished by the deed of February, 1866. The attempt therefore to treat the conveyance to Sampson as an assignment merely of a portion of the mortgage debt due by Crawford, and of the several pieces of land as if they had specific sums attached to them as part of such mortgage debt, and for which the lands were a security only, is, as it seems to me, quite illusory; and what the deed did effect was simply to transfer to Sampson the fee simple estate in the pieces of land named, subject to the privilege which the respective purchasers of Crawford's equity of redemption therein might have, if they should choose to avail themselves of it, to call for the legal estate to be conveyed to them under the terms of Hannah's

covenant; but in the event of such privilege not being asserted, the estate would pass to Sampson's heirs and assigns in fee simple, and no personal demand whatever passed entitling Sampson or any one claiming under him to recover payment of any sum of money as a debt, nor to enforce any claim other than by a bill in equity, to call upon such respective purchasers to avail themselves of their privilege, or to have it utterly extinguished.

In like manner the deed of the 5th of May, 1869, from Sampson to Chambers, conveyed to Chambers, his heirs and assigns, in fee, the lots therein mentioned, including these lots 96 and 97, subject to the defendant having the privilege, if he should choose to assert it, to have the legal estate conveyed to him under the terms contained in Hannah's covenant; and upon the death of Chambers intestate, that estate descended to and is now vested in his heirs-at-law, and was not capable of being transferred to any one by a deed executed by his personal representative. The deed therefore from Mary Chambers to Hunter was simply inoperative, as was that also of the date of July 7th, 1876, from Joshua Crawford to Hunter; for since the execution of the indenture of the 20th of February, 1866, Crawford had no estate, claim, or demand whatsoever, in, to, or upon, or arising out of the lands in question, which he could convey.

But further, even if the operation of the deed of the 10th of June, 1867, could have been such as to have conveyed to Sampson the right to recover the £73 15s, which the defendant had covenanted to pay Crawford as a personal demand, enforceable by suit against the defendant, as seems to have been supposed by the draftsmen of that deed, it only could have been so conveyed as a personal demand which Hannah's estate, in virtue of the deed of the 20th of February, 1866, had against the defendant by reason of his being the assignee of the equity of redemption of Crawford in the lots 96 and 97, whereas in the present action the claim is demanded in the declaration, not in the interest of Hannah's estate, but adversely to it, in the in-

terest of Hunter as an assignee of Crawford, before the execution by him of the deed of the 20th of February, 1866. The deeds executed since the execution of that deed have not had, in my opinion, and could not have any effect upon the rights of the parties to this suit. And in view of the fact of which evidence was given by the defendant that he never has had possession of the lots in question, and of the breach by Crawford of his covenant with the the defendant, contained in his deed to the defendant, and of the provisions of the indenture of the 20th of February, 1866, I am of opinion that neither Crawford nor Hunter, nor any one claiming under him, can, either in his own name or in Crawford's, recover the money sought to be recovered in this suit. The legal estate in these lots 96 and 97 is now vested in the heir-at-law of Chambers, subject always to any claim, if any, which the trustees of Hannah's will may have to avoid the deed to Sampson, and subject also to what right the defendant may have of claiming the benefit of Hannah's covenant, if he should choose to avail himself of it, and if he has not, by suffering such a length of time to elapse without claiming any interest therein, lost the benefit thereof. But assuming him still to be entitled to claim the benefit of that covenant, he could only obtain it by payment to the assignee of Hannah's trustees, namely, to the heir of Chambers, of moneys sought to be recovered by the plaintiff in this suit in the right of Hunter.

Whether or not a suit in equity might be framed with other parties before the Court, in which equal justice might be administered both to and against the defendant, if, after payment of what Hannah's estate may have had a right to receive before perfecting the defendant's title, there should appear to be any surplus payable by the defendant, we express no opinion.

We do not feel called upon, in view of such evidence as we have before us, to say more than that we think the equitable issue upon which the parties have been content to rest the case has been substantially proved in favor of

the defendant's contention, and that the plaintiff, upon the facts disclosed to us, is not in a position to enforce payment of the moneys which he seeks to recover in this suit. The rule therefore will be discharged, and the defendant's verdict stand.

HAGARTY, C. J., concurred.

Rule discharged.

GAUHAN V. THE ST. LAWRENCE AND OTTAWA RAILWAY COMPANY.

Conversion of goods—Evidence—Charge for storage.

The plaintiff, at Guelph, sold to B. & Co., at Ottawa, 65 barrels of pork, and shipped it by the Great Western Railway Company, the shipping receipt acknowledging the receipt of the same, addressed to the plaintiff's order at Prescott, and to notify B. & Co., Ottawa. The pork was carried by Great Western Railway and steamer *Passport* to Prescott, her manifest shewing a delivery there into the defendants' charge, and stating that the plaintiff was owner, and that B. & Co. were to be notified. B. & Co. were large dealers in Ottawa, and all goods for them or in which they appeared interested were, by arrangement with the defendants, sent on to Ottawa. This pork was accordingly sent on and inspected by B. & Co., who refused to accept it. The plaintiff, who was fully aware of all that had occurred, demanded the pork from the defendants' agent at Prescott, but at the same time requesting him to endeavour to get B. & Co. to accept it. The agent refused to deliver up the pork unless the storage charges were paid, which the plaintiff refused to do.

Held, that the carrying the pork to Ottawa did not in itself constitute a conversion.

Held, also, that the plaintiff's refusal to pay the storage charges would prevent his recovery.

THIS action was trover for the conversion of the plaintiff's goods; and for trespass to goods.

Pleas.—1. Not guilty. 2. Not the goods of the plaintiff.

The cause was tried before the County Judge (sitting for Patterson, J. A.) and a jury, at Guelph, at the Spring Assizes of 1878, when a verdict was entered for the plaintiff with \$1,106.22 damages. The evidence so far as material is set out in the judgment.

In this term, May 22, 1878, *Becher*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a nonsuit on the leave reserved, on the ground that no trespass or conversion was proved, and that the defendants were entitled to storage; or to reduce the verdict; or for a new trial for misdirection of the learned Judge, in telling the jury that the plaintiff should recover the full value of the goods, and that a conversion was proved; and for non-direction in not telling the jury that the plaintiff was damnified by his own neglect; and on the law and evidence.

During the same term, June 4, 1878, *M. C. Cameron*, Q. C., shewed cause. There was evidence of conversion. It is sufficient to constitute such conversion that the plaintiff by means of an unauthorized act has been deprived of his goods, either permanently or for an indefinite time. It was no part of the defendants' duty to carry the goods to Ottawa and expose them to the sun. This was an unauthorized act which deprived the plaintiff of his goods, and therefore constituted a conversion so as to entitle the plaintiff to maintain this action. The refusal of the defendants to give up the goods unless the charges for storage were paid also constituted a conversion: *Heald v. Carey*, 11 C. B. 977; *Fouldes v. Willoughby*, 8 M. & W. 540; *Tear v. Freebody*, 4 C. B. N. S. 228; *Hiort v. Bott*, L. R. 9 Ex. 86; *Heugh v. London and North-Western R. W. Co.*, L. R. 5 Ex. 51.

Becher, Q. C., contra. The evidence shews that the defendants were bailees of the goods, the goods having been put into their charge, and they never acted in any other capacity than as bailees. The plaintiff was well aware of the dealing with Bate & Co. The cases shew that the mere asportation of the goods does not constitute a conversion, but that there must be an intent to convert the goods to the use of the defendants, or some third person for whom they were acting. Here the defendants never attempted to assert any ownership over the goods inconsistent with the plaintiff's rights, and in no respect was there any intent to convert: *England v. Cowley*, L. R. 8 Ex. 126; *Hiort v. Bott*, L. R. 9 Ex. 86; *Burroughes v. Bayne*, 5 H.

& N. 296; *Heald v. Carey*, 11 C. B. 977; *Add. on Torts*, 4th ed., 320-1; *Hayward v. Seaward*, 1 M. & Scott 459; *Browne on Carriers*, 221-2. The defendants had the right to charge for the storage, and in the absence of any offer or tender to pay such charge the action must fail: *Scarfe v. Morgan*, 4 M. & W. 270.

June 28, 1878. HAGARTY, C. J.—It is impossible that we could allow the verdict recovered by the plaintiff for the value of his pork to stand on the evidence laid before us.

We can see no evidence whatever of any conversion or trespass by the defendants in the receipt or carriage of this pork to Ottawa. The pork was sold by the plaintiff, living in Guelph, to Messrs. Bate & Co., of Ottawa. It was shipped by the Great Western Railway from Guelph, and a shipping receipt is produced, dated July 18th, 1877, acknowledging receipt of sixty-five barrels of pork, addressed,

Order F. GAUHAN, Prescott.

Notify C. T. BATE & Co., Ottawa.

Freight paid.

This receipt is endorsed by the plaintiff, and we find it annexed to a draft of the same date for \$1,057.90, drawn by the plaintiff to his own order on C. T. Bate & Co., at the Ontario Bank, Ottawa, endorsed by the plaintiff to the order of the Ontario Bank, Guelph. The Great Western Railway Company sent it on by steamer Passport. Her manifest, dated 20th of July, shews that the pork was landed at Prescott and delivered to the defendants' company. It is headed "in charge of St. L. & O. Ry."

"Owners, Order F. GAUHAN, Prescott.

"Notify C. T. BATE & Co., Ottawa."

Bate & Co. are large dealers in Ottawa, and according to their understanding with the defendants, all stuff in which they appeared interested, or for them, was sent on by the defendants.

The defendants sent it on the same day to Ottawa, notifying Bate & Co. The latter on inspecting some of it objected to its quality, and several letters and telegrams passed between them and the plaintiff and one Lees, from whom the plaintiff had purchased the pork, and who was acting for the plaintiff.

It is very clear from all this that the plaintiff was fully aware that the pork was in Ottawa, and he, Mr. Lees, strongly urged Bate & Co. to take it and to accept the draft.

We can see no pretence for holding the defendants liable for taking the pork to Ottawa.

Bate & Co. finally refused to take the pork unless it was put in good order. Then the plaintiff, about the 27th of July, wrote complaining that Bate & Co. had got the pork taken to Ottawa, though sold in Prescott.

The plaintiff, on the 28th of July, tells Bate & Co. that he wants the pork back to Prescott, and that he would charge them and Lees for the time it had been unnecessarily exposed to the sun in Ottawa. On the 30th of July he telegraphed Bate & Co. to the same effect.

On the same day he writes to them that as they had assumed authority to remove the pork to Ottawa, where it was exposed to the sun and weather, that either Bate & Co., or the agent of the Richlieu and Ontario Steamship Co. must account to him for the amount of his draft. He states that he must place the matter in the hands of his solicitors unless arranged at once, and hopes the draft would be accepted. On the same day he writes to the steamboat agent complaining of what has happened, and that he would hold the company responsible.

Mr. Jones, the agent, also acted as freight agent for the defendants at Prescott.

On August 4th he writes again to Jones (not stating in what capacity he addresses him), that he must hold "his company" responsible, and that he would be in Prescott on Wednesday next.

On the 8th of August the plaintiff states that he went to Prescott and saw Jones. He said he demanded his

pork there. It was then, as he knew, at Ottawa. He also saw Taylor, the defendants' freight superintendent. They asked him to go and examine its condition at Ottawa. Taylor said "You can get your pork by paying the charges on it : it is now in Ottawa under a storage fee of five cents per barrel per week, and will be while it remains there." The plaintiff replied, "You had no right to handle my pork. I will not pay one single cent of charges on it." He admitted that he may have asked them not to tell Bate & Co. that he was there. He says he was most anxious that Bate & Co. should take the pork, and asked Jones to write a telegram and do everything else to induce Bate & Co. to take it. He then telegraphed Lees to come down and to meet him at Kingston Station. He did so, and the plaintiff instructed him to go on to Ottawa. He went, examined the pork, and saw Bate & Co. Lees said he expected to find it in Bate & Co.'s store, but it was at the defendants' station. He says he does not recollect trying to get Bate & Co. to take it, as he had no instructions to that effect. He did tell Bate & Co. that if the pork were his he would make it all right at once; that the plaintiff did not understand the business.

Jones and Taylor deny emphatically that the plaintiff ever made any demand on them for the pork, or that they said anything whatever about charges.

On the 23rd of August, finding that nothing was done, the defendants sent the pork back to Prescott, and Jones telegraphed the plaintiff that the sixty-five barrels were there at his risk, with charges for storage "which please pay, and give orders as to disposal."

Jones says that that the storage he meant was from 23rd of August, and that the telegram was not worded exactly right.

On the 24th of August the plaintiff telegraphs to Jones acknowledging the receipt, "the sixty-five barrels pork I was dispossessed of on 20th July last, Great Western Railway must now pay me therefor."

On September 1st the plaintiff wrote to the agent of the Great Western Railway in effect that he was reluctantly compelled to look to them for his loss, stating he

had gone to Prescott for the purpose of getting his property, but could not get it as it was not there to his order.

It appears that he brought an action against the Great Western Railway, which he afterwards withdrew. This suit was brought the 18th of March, 1878.

It would seem that the plaintiff for some time after his last communication with the defendants did not appear to regard them as having caused the loss of his property, but was looking either to the steamboat company or the Great Western Railway.

We can see no reason whatever for holding the defendants liable in this action, unless on some evidence that they have tortiously deprived the plaintiff of his property, or of his lawful dominion over it. Up to his alleged demand at Prescott there is no cause of action.

We consider that the property came lawfully into the defendants' hands, and that they committed no wrong thereto.

Up to the demand at Ottawa the plaintiff was urgent that Bate & Co. should still take the pork. After he left Prescott and saw Lees at Kingston, on his way to Ottawa, where he still wished Bate & Co. to be induced to take it there was no conversion or pretence of conversion.

If he rest on this alleged demand and refusal he must still fail. He says they told him he would have to pay storage charges.

He said he would not, and he never tendered any such charges or asked for the amount thereof, nor did the defendants in any way dispense with a tender thereof.

The goods came lawfully into their hands. Had they remained at Prescott, as the plaintiff now insists they should have remained, from July 20th to August 6th, when he went down, were the defendants bound to hold them and protect them in store for nothing?

Had Bate & Co. taken the goods there would have been no charge as against the plaintiff. Bate & Co. refused them, and the defendants could not recover any charge against them for storage or freight. It was not the defendants' fault that the goods were not accepted.

Then we find that certain goods of the plaintiff were, by plaintiff's authority, lawfully placed in defendants' hands as a Railway Company, for a purpose which ultimately failed through no default of the defendants. Then the plaintiff has the right to get back his goods on paying any lawful charge to which the defendants were entitled.

There is no evidence whatever of any offer or tender, or willingness, of the plaintiff to pay any such charges.

We think on this short ground alone—assuming his own evidence to be correct—that the plaintiff fails to shew a right to recover in trespass or trover. Whether the defendants' agent spoke of storage at Ottawa or at Prescott would not affect their right to storage generally.

But it may well be doubted whether even such a demand as the plaintiff says he made, or what then took place, could possibly amount to evidence of a conversion. He at the same moment is fully aware his goods were in Ottawa, and he suggests to the very persons he now wants to treat as tortfeasors that they should still try to get Bate & Co. to accept, and telegraphs Lees apparently with the same object.

Had we considered that his statement did technically furnish evidence to go to a jury of a conversion, we should still have felt bound to set aside the verdict as against law and evidence.

A large amount of evidence was taken inapplicable to this case, but relevant if it were an action between the plaintiff and Bate & Co.

Even the jury—hostile as their general view was to the defendants—state that there was nothing to prevent the plaintiff from remedying the deterioration of the pork and attending to its safety, and that he did nothing to prevent damage to it.

We think the rule must be absolute to enter a nonsuit.

GWYNNE, J., concurred.

Rule absolute.

YOUNG V. SMITH.

Landlord and tenant—Rent to become due on removal of goods—Distress.

Under a proviso in a lease, on the tenant commencing to remove the goods from the demised premises the then current year's rent immediately became due and in arrear. On 31st October, on the tenant proceeding to sell and dispose of all the goods on the demised premises, with the intention of finally quitting the place before the 21st November following, when the rent became due and the lease terminated, the landlord entered and distrained.

Held, that under the terms of the proviso the current year's rent became due and in arrear, and the distress was therefore legal.

Griffith v. Brown, 21 C. P. 12, and *Re Hoskins*, 1 App. 379, distinguished, as being between the landlord and persons claiming under the insolvency, whereas here it was directly between the landlord and tenant, the parties to the contract.

It appeared that the lease was not executed by the plaintiff, but by his brother alone, but that they were both jointly interested, and that the plaintiff treated himself as tenant.

Held, that under these circumstances the plaintiff must be deemed to be such tenant, and subject to the terms of the lease.

THIS was an action brought against the defendant by one John Young.

The first count of the declaration was for wrongfully distraining and detaining goods when no rent was due, contrary to the statute, &c.

Second count: Trespass *quare clausum fregit*, and taking and converting the plaintiff's goods.

Third count: Trover.

It is only necessary to set out the sixth and eighth pleas, to the second and third counts respectively, upon which the judgment turned. These pleas set up in substance that the lease was made to one Robert Young, and that by the proviso in the said lease it was provided that if the said Robert Young should abscond or commence to remove his goods from the premises, the rent for the current year should immediately become due and in arrear; and alleged that the said Robert Young commenced to remove his goods from the said premises shortly before the expiration of the third year of the said term, whereby the said rent for the then current year became due and in arrear.

The cause was tried before Galt, without a jury, at Hamilton, at the Spring Assizes of 1878.

The lease was under seal, dated 27th November, 1874, and was made between Jacob Smith, of the township of Glanford, in the county of Wentworth, yeoman, thereafter called the lessor, of the first part, and Robert John Young, of the same place, yeoman, thereafter called the lessee, of the second part, of certain premises described, for five years from the 7th November, 1874, at a rental of \$350, payable on 27th November, in each and every year during the continuance of the term, the first payment to be made on the 27th November, 1875. It contained a covenant by the lessee, that in case the said lessee "shall abscond or remove, or commence to remove his goods from the premises, the rent for the current year shall immediately become due and in arrear, and the said term shall immediately become forfeited and void, but the rent for the current year shall nevertheless be at once due and payable."

The lease was under seal, and was executed by the defendant, and by Robert Young.

It appeared that though Robert Young alone executed the lease, that he and his brother, the plaintiff, John Young, were in partnership, and jointly interested in the lease and in the goods and chattels on the demised premises.

By a memorandum endorsed on the back of the lease, dated 8th September, 1877, it was agreed that the lease was to be given up and cancelled on the 27th of November, 1877, when the term was to terminate. This was signed by Robert Young and the defendant.

On the 31st of October, 1877, in pursuance of an advertisement to that effect, Robert and John Young proceeded to sell the goods and chattels on the demised premises, with the intention of selling all the said goods, and finally quitting the premises, and after some of the goods had been sold, the lessor, claiming that there had been a breach of the covenant not to remove the goods, &c., issued

a distress warrant to one Servos, as his bailiff, directing him to distrain "the goods and chattels of John Young, the tenant in the house he now dwells in, or upon the premises in his possession, situate and being," &c., "for the sum of \$350, being the amount of one year's rent due to me on this date, by virtue of the provision in the lease of said premises from me to said Robert John Young, bearing date the 27th of November, 1874."

In pursuance of this distress warrant, the bailiff then distrained the goods and chattels in question on the said premises, when he was paid the amount of the rent, as appears by the following receipt:

"BARTON, October 31st, 1877.

"Received from John Young the sum of \$364 in full of rent and bailiff's costs for possession of lot," &c., describing it "up to 27th day of November, 1877.

"(Signed) E. SERVOS."

The learned Judge was of opinion that the sixth and eighth pleas were proved, and he entered a nonsuit.

In Hilary term, February 7, 1878, *Duff* obtained a rule *nisi* to set aside the nonsuit, and to enter a verdict for the plaintiff.

During the same term, May 27, 1878, *Osler*, Q. C., shewed cause.

Duff contra.

They referred to *Griffith v. Brown*, 21 C. P. 12; *Re Hoskins*, 1 App. 379.

June 28, 1878. GWYNNE, J.—*Griffith v. Brown*, 21 C. P. 12, and *Re Hoskins*, 1 App. 379, have no application to this case. There the question arose between the landlord and persons claiming through the insolvency of the tenant, and under the provisions of the Insolvent Act; here it arises directly between the landlord and tenant, the parties to the contract, by which it was declared that in the event of the tenant commencing to remove his

goods from the demised premises, the then current year's rent should immediately become due and in arrear. That was part of the contract under which the tenant entered, and whether the plaintiff, who claims to have been the defendant's tenant, was so or not, he can be in no better position than the tenant himself would have been; his goods if on the demised premises would be liable to distress, if under the circumstances the rent became and was due and in arrear.

A question might arise whether in the particular case the goods being removed by the tenant brought the clause of the lease invoked into operation, for plainly by the lease it was competent for the tenant to dispose of some portion of his property upon the farm. Indeed, to apply the clause to any removal would be quite absurd; but in this case it clearly appears that the tenant or tenants was or were removing everything with the intention of finally leaving the premises before the 27th November, after which day, by special agreement, the lease was to be given up wholly, and upon which day, by the lease, the year's rent became due. The object was clearly to remove everything before that day, and the effect would have been that the landlord could not have distrained. This was such a removal, or commencement to remove, as it appears to me, as made the current year's rent become under the terms of the lease due and in arrear, and therefore the tenants could not complain of a distress being levied. The plaintiff, who treats himself as tenant jointly with his brother, may, I think, be held to that position although he has not executed the lease, and so subject to the terms of the lease, which in the event which happened authorized the distress which was made; and instead of a nonsuit there should be a verdict for the defendant.

HAGARTY, C. J., concurred.

Rule accordingly.

FIELDS V. RUTHERFORD ET AL.

Surgeon—Malpractice—Negligence—Evidence—Nonsuit.

In an action against a surgeon for malpractice, one of the medical men called for the plaintiff stated, though not in terms condemning defendant's treatment or alleging negligence therein, that he would have pursued a different course; but the weight of evidence shewed clearly that the course of treatment pursued by the defendant was such as would have been adopted by medical men of competent skill and good standing in the profession:

Held, that there was no evidence of negligence to submit to the jury, and a nonsuit was entered.

DECLARATION: That the plaintiff employed the defendants to cure his right shoulder, &c., and they promised to bestow the necessary skill, care, and attendance in and about the reduction of the dislocation and the curing of the shoulder, &c. Breach, that the defendants ignorantly, unskillfully, carelessly, and negligently treated the plaintiff, so that the shoulder remained dislocated and out of place, &c.

Plea: not guilty.

The cause was tried before Armour, J., and a jury, at Chatham, at the Spring Assizes of 1878, when a verdict was rendered in favour of the defendant Holmes, and against the defendant Rutherford, with \$300 damages.

The evidence, so far as material, is stated in the judgment.

In this term, May 22, 1878, *Robinson*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiff as against the defendant Rutherford, and to enter a nonsuit or verdict for the defendant Rutherford on the leave reserved, on the ground that there was no evidence of negligence to go to the jury; or for a new trial, on the law and evidence and weight of evidence, and for misdirection and non-direction of the learned Judge in telling the jury that it was for them, applying their own common sense, to decide between the conflicting opinions of medical witnesses as to the proper course to follow and proper treatment, whereas he should have directed the jury that if the treatment and practice pursued was

such as, according to the evidence, might and would have been pursued by medical men of competent skill and care and good standing in their profession, the defendant was not guilty of negligence.

During the same term, June 7, 1878, *M. C. Cameron*, Q.C., shewed cause. The question of malpractice is purely a question of fact for the jury. The evidence of the medical men called for the plaintiff shewed that the treatment was not such as should have been pursued under the circumstances. Being purely a question of fact it must have been submitted to and could not have been withdrawn from the jury. There was clearly some evidence to go to the jury, and therefore their verdict cannot be interfered with. Even if there was misdirection this is merely a ground for a new trial, and not for a nonsuit: *Fawcett v. Mothersell*, 14 C. P. 104; *Jackson v. Hyde*, 28 U. C. R. 294.

Robinson, Q.C., contra. It is not disputed that in every case all questions of fact must be submitted to the jury, but there must be not merely a scintilla of evidence, but some reasonable evidence to submit to them. There must be some affirmative evidence, and not evidence which is equally consistent with the presence as with the absence of negligence. The evidence of the medical men called for the plaintiff was clearly insufficient, while the evidence of those called for the defendant was clear that the treatment pursued by the defendant was such as would have been pursued by men of competent skill, and care, and good standing in their profession. It should not have been left to the jury to say whether the treatment recommended by Dr. Brown or the treatment pursued by the defendant and approved of by the medical witnesses for the defence, was the better or safer treatment. It is said that in such actions the Judge should firmly assume the responsibility of determining himself whether sufficient evidence has or has not been given to compel him to leave the case to the jury. Here there was no evidence to go to the jury, and a nonsuit should have been entered: *Jackson v.*

Hyde, 28 U. C. R. 294; *Thackeray v. Askin*, 22 C. P. 164; *Shearman and Redfield* on Negligence, 3rd ed., sec. 434; *Wharton* on Negligence, sec. 736; *Woodman and Tidy's* Forensic Medicine, p. 715-6; *Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. 193.

September 5, 1878. HAGARTY, C. J.—We are all of opinion that the verdict against defendant Rutherford must be set aside, leaving the verdict which was properly rendered for the defendant Holmes undisturbed.

We think the medical testimony was overwhelmingly in favour of the defendant's course of treatment.

Three doctors were called for the plaintiff, Doctor Tighe, Doctor Clayton, and Doctor Brown.

Doctor Tighe's only objection to the treatment seems to have been that the defendant might have himself put on the sling. But he adds, the woman (*i. e.*, plaintiff's wife, who was examined) seems to have put it on right. He does not usually bandage.

Doctor Clayton, as far as we can see, does not state that there was any neglect, except that he says he usually carries out his own instructions in surgical cases. He does not go any further.

Doctor Brown thinks there should have been a pad, and a bandage. As to the sling, its length would be important, and he never saw the woman that he would trust to do a thing like that. "*Every one has his own way of doing business.*"

This was the medical evidence for the plaintiff, and even on it we should think the verdict should not be upheld without another trial. We do not understand any one of the plaintiff's witnesses stating affirmatively that there was any malpractice, ignorance, or neglect on the defendant's part. Doctor Brown, though stating that he would use pad and bandage, does not make any positive charge against the defendant's procedure. He tells us what *he* would do.

On the defence, besides the strong evidence of both the defendants, (and not reckoning Dr. Stocker, defendant's

partner,) six medical gentlemen strongly uphold the propriety of the treatment adopted, and negative all idea of neglect either in procedure or attendance.

Towards the end of the trial it seemed to be clearly conceded all round that the dislocation was properly reduced at the time, and the case seemed to be rested on the failure to see the sling properly adjusted, and to go back to attend again on the patient, a distance of five miles, although not retained or requested so to do.

As we read the case as reported to us in the shorthand writer's notes, the jury were left to judge of the treatment which should have been adopted,—whether it was proper to use pad or bandage; whether it was reasonably careful to leave the putting on of the sling to the plaintiff's wife; whether it was negligent not to come again to see how the patient was getting on when no engagement so to do had been proved; whether, applying their common sense to the evidence, there ought to have been some roller bandage round the arm and body. The jury were, in substance, to decide whether Doctor Brown's views or those of the other medical men were correct.

All the surgeons examined on the subject seem to have agreed that the muscle called the "Teres major" was injured—a very unusual thing. Doctor Brown alone said he did not believe this.

Theoretically, and, we may add, literally, the jury have the unquestioned right to decide every controverted fact, whether its decision may involve the most abstrusively difficult and uncertain questions in the regions of scientific enquiry.

We must, however, be very careful to see how the decision of such questions bears upon the rights and duties of parties.

The implied contract of every medical man (in common with other professedly skilled workmen) is that he will possess a reasonably fair amount of knowledge in his profession, such as a man of fair intelligence and industry may be reasonably supposed and expected to possess; and

that in his practice he will exhibit a reasonably skilful and diligent conduct and attention to the cases entrusted to him.

In the case before us the defendant Rutherford very fully proved that his treatment of this case was in accordance with the sworn opinions of a number of his professional brethren, men whose veracity and standing were in no way impeached.

They declared it to be in full accord with the received notions of medical treatment.

Doctor Brown, we may say, alone declares in favour of a different course of treatment, although he does not, in terms, condemn the actual treatment, or say there was any negligence causing damage.

It was no part of the defendant's implied contract that his treatment should accord with Doctor Brown's views, however high that gentleman's skill may be rated. Nor can we regard it as within his legitimate liability, that where a large number of respectable practitioners, with Doctor McLean at their head, fully vindicate the correctness of his treatment as usual and well approved in the profession, it is to depend on the opinion of an ordinary jury whether the treatment recommended by Doctor Brown or that adopted by half a dozen other unimpeached witnesses is in their judgment the better or the safer treatment.

The jury were told that there was no doubt but that the dislocation was properly reduced. The question was as to the after treatment. This involved the directions as to the sling, the use of pad or bandage, and the subsequent non-attendance. We have already referred to the sling, pad, and bandage.

The injury to the shoulder seems in no way to have interfered with the patient's power of moving about.

The defendant says he told the family that the plaintiff was to come and see him soon after. This is denied, and the jury, we may assume, chose to believe the denial.

But there was no evidence of any retainer or promise to attend. Doctor Brown alone, of the many doctors examined, declared that he would of his own accord have

gone again to see the man, and would make him pay for it. The defendant states that, living five miles away and not being specially asked to come again, he took it for granted that the plaintiff would come to him : that such dislocations are considered "office practice," the patient being fully able to come to him,—thus adopting by far the least expensive course. This is corroborated as a common practice. It is strange here that the plaintiff, moving about as he was and perfectly able to go to the defendant or any other doctor, waited for many weeks before seeking any advice.

The present Chief Justice of the Supreme Court, Sir W. Richards, in *Fawcett v. Mothersell*, 14 C. P. 104, says at p. 109: "Judges are generally desirous of impressing on juries the necessity of construing everything in the most favourable way for the defendant when such actions are brought against a surgeon."

In *Jackson v. Hyde*, 28 U. C. R. 295, the Court say, at p. 296, "It is notorious there are many cases in which jurors are not the most dispassionate or most competent persons to try the rights of parties, and an action of this kind" (against a surgeon) "comes within the class to which I have alluded. In such actions the Judge should firmly assume the responsibility of determining himself whether sufficient evidence has or has not been given to compel him to leave the case to the jury." A new trial without costs was ordered.

The plaintiff's witnesses, including medical men, swore the amputation of the plaintiff's arm should have been above the elbow ; while, on defendant's side, several medical men of the highest reputation approved thoroughly of the defendant's course.

The case was left to the jury, the defendant's counsel objecting there was no evidence to support the action. No leave was reserved. If so, we presume a nonsuit would have been directed by the Court. The principles laid down in the cases collected in *Deverill v. Grand Trunk R. W. Co.* 25 U. C. R. 517, and cited at page 176 of *Thackeray v. Askin*, 22 C. P. 164, favour the view that a nonsuit would be proper on this evidence, either on the ground that no affirmative

evidence of negligence or malpractice was given, or that the evidence was, taking it most strongly for the plaintiff, equally consistent with the absence or presence of negligence or want of skill; or that it was proved beyond question, as in *Jackson v. Hyde*, 28 U. C. R. 294, that the defendant's treatment was sanctioned and fully approved by a number of witnesses of unimpeached standing and veracity.

Our only hesitation here would be between nonsuit and new trial without costs.

On the whole, I come to the conclusion that, if I rightly understand the principles laid down in these cases, if the plaintiff refused to accept a nonsuit the Judge should direct the jury that the only proper verdict on such as would be for the defendant.

The plaintiff (1) proved no act of negligence or want of proper skill or care. (2) There is no ground for assuming that any damage to the plaintiff has resulted from any thing done or omitted to be done by the defendant. (3) At the best, the evidence was equally consistent with the existence or the non-existence of negligence. (4) The course pursued by the defendant was fully approved of by a number of skilful and unimpeached witnesses. (5) Lastly, within the definition given by Lord Cairns in the latest case on the subject, *Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. 193, 197, there were no facts established in evidence from which negligence could be reasonably inferred.

GWYNNE, J.—*The Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. 193, 197, confirms the judgment of Maule, J., in *Jewell v. Parr*, 13 C. B. 909, at p. 916, and recognises the rule as there laid down by him, namely, that it is for the Judge to determine whether there is or not such evidence as ought reasonably to satisfy the jury that the fact sought to be proved is established.

Lord Cairns there formulates the rule thus, at p. 197: "The Judge has to say whether any facts have been established by evidence from which negligence *may* be reason-

bly inferred; the jury have to say whether, from those facts, when submitted to them, negligence *ought* to be inferred." But in whatever form of words the rule be expressed, it is for the Judge to say whether the case should or not be submitted to the jury. And the rule is imperative that it should not be, unless the evidence be such that therefrom the negligence charged *may be reasonably* inferred.

Now, in the case before us, the point which the plaintiff assumed to establish was that the injury under which he now suffers is attributable to the negligence of the defendant. The point thus to be established necessarily required that it should be established by the evidence of scientific witnesses, skilled in surgery and in the treatment of personal injuries. There were three professional witnesses called by the plaintiff, and six by the defendants. It is only necessary to refer to the evidence of those called for the plaintiff, for it is beyond all controversy that if the evidence of those called by the defendants is that which is to be relied upon, there is no shadow of foundation for the action. Now, of those called for the plaintiff, not one of them ventures to point to any particular act or default of the defendant to which he is willing to pledge his belief that the plaintiff's present condition can reasonably be attributed.

Indeed, the professional gentlemen cannot agree as to the nature of the injury which the plaintiff has sustained. They cannot concur in their answer to the important question, namely, what was the injury which the plaintiff suffered before the services of the defendants were at all required. All the professional gentlemen called by the defendant appear to concur in the opinion that a muscle called the *Teres major* was injured by the accident which befel the plaintiff. Of the professional gentlemen called by the plaintiff, two were not interrogated upon the point, the third gave it as his opinion that the *Teres major* was not injured, but he also said that if the muscle was injured, it must have been injured at the time of the accident in

the first instance, and that in that case a cure would be impossible.

Under these circumstances, it appears to me that the learned Judge who tried the case, in accordance with the principles laid down in *Hyde v. Jackson*, 28 U. C. R. 294; *Thackeray v. Askin*, 22 C. P. 164, and *The Metropolitan R. W.Co. v. Jackson*, L. R. 3 App. 193, should have withheld the case from submission to the jury for the want of evidence from which it could reasonably be inferred that the plaintiff's sufferings are fairly attributable to any act or default of the defendant.

GALT, J., concurred.

Rule absolute.

IN RE THE MINISTER OF EDUCATION AND THE PUBLIC
SCHOOL BOARD OF THE TOWNSHIP OF MACAULAY AND
THE PUBLIC SCHOOL BOARD OF THE VILLAGE OF
BRACEBRIDGE.

*Public schools—Township by-law forming public school board—Validity—
Effect on portion united to village—Two-thirds majority—37 Vic. ch. 28,
sec. 48, O., 40 Vic. ch. 16, sec. 6, subsecs. 1, 7, O.*

On the 1st of January, 1875, Bracebridge, hitherto forming part of the township of Macaulay, was incorporated as a village. At the time of incorporation Bracebridge and a portion of the township, being the territory in dispute, formed school section No. 1, Macaulay, which on incorporation became the Bracebridge section, the school house being in Bracebridge. In October, 1875, the township of Macaulay, on petition of two-thirds majority of the township sections, not counting the territory in dispute, passed a by-law, under section 48 of 37 Vic. ch. 28, O., abolishing the division of the township into sections, and forming a public school board for the township for the management of all the schools therein, and promptly after the passing thereof the school board erected a school house in the disputed territory, which had ever since been open and attended. The by-law thus passed was acted upon for nearly three years, and no motion made to quash it. In November, 1876, at a meeting of the county inspector and the reeves of Bracebridge and Macaulay, with a representative from each school board, to alter the boundaries of the Bracebridge section, a portion of the disputed territory was set off to Macaulay, and the other portion retained by Bracebridge.

Held, that the by-law was not invalid on its face, nor beyond the jurisdiction of the council.

Held, also, that after the passing of the by-law the disputed territory became detached from Bracebridge, and came under the control of the township school board, and continued thereunder notwithstanding the action of November 1876; and that at all events under sec. 6, subsec. 7 of 40 Vic. ch. 16, it became so detached on 1st of January, 1878.

Held, also, that under 40 Vic. ch. 16, sec. 6, subsec. 1, the territory in dispute was not necessary to be considered in ascertaining the two-thirds majority, and that it did not appear to be necessary even under sec. 48 of 37 Vic. ch. 28, O.

THIS was a case submitted by the Minister of Education for the decision of this Court under section 17 of Title XIII of R. S. O. ch. 203, page 2027, at the request of the public school boards of the village of Bracebridge, and the township of Macaulay.

The following is a statement of the facts agreed upon by the members of both school boards.

Prior to the 1st day of January, 1875, the village of Bracebridge was included in, and formed part of, the township of Macaulay.

In 1874 the council of the county of Victoria passed a by-law to incorporate the village of Bracebridge, and on the first day of January then next it became a separate municipality. At the time of the incorporation, the village of Bracebridge and a portion of the township formed one school section, known as school section No. 1, Macaulay, the school-house being within the limits of the village incorporation.

By 37 Vic. ch. 28, sec. 74, O., it is enacted that "The school boundaries of a village rural school section, or other school division, existing at the time of its incorporation as a village or town municipality, shall continue in force, and be considered as the school boundaries of the newly incorporated village or town, notwithstanding its incorporation, until such boundaries are altered under the authority of this Act." R. S. O., title xiii., ch. 204, p. 2051, sec. 83.

In October, 1875, the township council of Macaulay passed a by-law under section 48 of the Act of 1874 (37 Vic. ch. 28) to abolish the division of the townships into school sections, and to establish a public school board for the township.

At the time of the passing of the by-law there were six school sections in the township of Macaulay in addition to the part of the township united with the village school section, which had hitherto been known as school section No. 1, Macaulay, and also two small portions of the township, each portion belonging to one individual, and being composed of two lots (200 acres) of land, which two portions were united with the township of Stephenson for school purposes.

School sections Nos. 2, 3, 4 and 5 passed the necessary resolutions, and petitioned the township council to pass the by-law, and No. 7 at that time was but recently formed, and had taken no steps to erect a school-house, or engage a teacher.

The portion of the township united with Bracebridge for school purposes, and the two small portions united with Stephenson did not hold meetings, or pass resolutions, as required by the 48th section of the 37 Vic. ch. 28, and

were not considered as school sections by the township council on passing the by-law upon the request of two-thirds of the school section of the township; the township council claiming that parts of sections were not entitled to be considered in the two-thirds majority: that whatever may be considered as the proper interpretation of the sections as the law stood at the time of the passing of the by-law, it is now expressly declared that "it shall not be necessary that any portion of the township which forms a union with another municipality or portion thereof shall be considered in respect of the said requisite number of two-thirds of the school sections of the township": 40 Vic. ch. 16, sec. 6 (1); R. S. O. Title 13, ch. 204, sec. 142, page 2082.

No steps have ever been taken to quash the by-law forming the township school board.

For some time after the formation of the Macaulay school board, some of the scholars hitherto attending the Bracebridge school section from that part of Macaulay claimed to belong to Bracebridge, were refused admission by the teacher of Bracebridge school, but such action on the part of the teacher was not sanctioned by resolution of the Bracebridge school board, although one of its members was cognizant thereof, and directed the teacher to refuse admission to the children who had usually attended Bracebridge school from the territory in dispute, under the supposition that such children were residing out of the limits of the section, but after the lapse of two or three months the scholars were again permitted to and did attend Bracebridge school.

The school board of Macaulay, as soon as organized under the by-law, promptly erected a school-house in the territory in dispute between the two school boards, and has ever since provided a teacher for and kept the school open, with a fair attendance of scholars.

The Bracebridge board requested the Macaulay council at its meeting held in the month of August, 1876, to collect in the territory in dispute a school rate, which the council of Macaulay refused to do.

In consequence of such refusal the Bracebridge board levied a rate, and sent their own collector into the disputed territory to collect it.

The Macaulay school board, through the township collector, also collected a rate in such disputed territory.

Some of the ratepayers in the disputed territory paid the Macaulay collector, and some the Bracebridge collector, other ratepayers paid both collectors under protest; and both the Macaulay and Bracebridge collectors seized the goods and chattels of those ratepayers, who respectively refused to pay the rates demanded by such collectors.

The Bracebridge school board (acting under the advice of counsel), in the belief that it was their duty to indemnify the ratepayers who had their goods seized by the Macaulay collector, gave a certain note or undertaking to such collector, and afterwards paid over to the Macaulay collector the amount therein mentioned.

On the 21st day of November, 1876, a meeting of the county inspector, and the reeves of Bracebridge and Macaulay, with a representative from each school board, was held in the village of Bracebridge under section 50 of the 37 Vic. ch. 28, for the purpose of altering the boundaries of the Bracebridge school section, at which meeting a portion of the territory in dispute was set off to Macaulay, and the other portion retained by Bracebridge. The reeve of Macaulay attended that meeting, and protested against the legality of the proceedings, on the ground that under the by-law forming the township board the whole of the territory in dispute passed to the township for school purposes, and also that the Bracebridge board were estopped by their own action in refusing to admit the scholars residing in the territory in dispute to their school; and the reeve of Macaulay signed the minutes of that meeting under such protest.

After the meeting above mentioned one of the ratepayers residing in that portion of the disputed territory which had been set off to Macaulay at the meeting of the reeves, &c., brought an action of trespass *de bonis asportatis* in the

Division Court against the Bracebridge school board, who did not seize the goods, &c., of such person till some time in the month of February, 1877. It was intended to appeal this case under sections 131 to 136 of the 37 Vic. ch. 28, but as there was some informality in the proceedings of the Bracebridge board in collecting the rate, the case was decided upon a technical point, and the merits of the case were not considered.

Before the Bracebridge school board proceeded to collect the rates they had the assessment rolls equalized as regards the different portions of their section within and without the corporate limits of the village. At the first election of trustees of the Macaulay school board a large number of the ratepayers residing in the disputed territory voted at such election, and one of such ratepayers was elected a trustee of the Macaulay school board, and made the usual declaration of office, and performed the duties of such trustee till the expiration of his term of office.

No notice was given the Bracebridge board of the intention of the Macaulay council to pass the by-law, other than through the columns of a newspaper published within the limits of the Bracebridge school section; but notice was given them in writing after the by-law had passed.

The first year of the incorporation of the village (1875), the Bracebridge school board requested the Macaulay council to levy and collect a school rate in the disputed territory, which was done, and the amount realized paid over to the Bracebridge school board. During the past year both the Bracebridge and Macaulay school boards levied school rates in the disputed territory, and the Bracebridge board, acting under the advice of counsel, agreed to indemnify one of the ratepayers upon whom the Macaulay collector had distrained.

Such ratepayers accordingly replevied the goods seized, and commenced an action in the County Court of the County of Simcoe against the Macaulay collector. An appearance has been entered in such action, and further proceedings stayed on consent of both parties.

The following questions were submitted for the opinion of the Court :—

1. Whether the territory in the case mentioned as having been united with the Bracebridge school section is, upon the facts stated, still united to the said Bracebridge section.
2. If the whole of such territory is not now so united, is the portion which, at a meeting of the county inspector, the reeves of Bracebridge and Macaulay, and of the representatives of the school boards, was set off as to be retained by Bracebridge school section, now united to such section?

In this term, May 28, 1878, the case was argued.

McCarthy, Q. C., for the public school board of Macaulay. The by-law was validly passed under sec. 48, of 37 Vic. ch. 28, O. The portions of the township attached to Bracebridge and Stephenson were not required to be computed in ascertaining the two-thirds majority. Under sub-sec. 1, only separate sections are to be counted, and not union sections or portions forming part of a union section. If the Legislature had intended otherwise they would have expressly so declared. Also there is no machinery in the Act for taking the vote of such unions or portions. The Act 40 Vic. ch. 16, O., which shews that the portions are not to be counted, is merely declaratory of the existing law. Moreover the application to quash is too late. The by-law being valid on its face no motion to quash can be entertained after the lapse of a year: R. S. O. ch. 174, sec. 323. Here over two years have elapsed.

Bethune, Q. C., for the Public School Board of Bracebridge. The concurrence of the portions united to Bracebridge and Stephenson was necessary in computing the two thirds majority. This is clearly the proper construction of the Act. The portions are just as much interested in the alteration as a separate section. The provisions of sec. 48 not being complied with the by-law is invalid. The Act, 40 Vic. ch. 16, sec. 6, O., cannot be construed as declaratory of the existing law, but its object is to meet a case unprovided for. It is apparent from the con-

clusion of the section that it does not apply to a case of this kind, but only to cases where a formation has been legally effected, and not merely *de facto*. On the incorporation of Bracebridge, section No. 1 became the Bracebridge section, and was a union section under sec. 74, of 37 Vic. ch. 28, O., so that the boundaries thereof could only be altered as provided by sec. 50 of the same Act. Even if the by-law had the effect of altering the boundaries of the Bracebridge section, it would only be made to take effect after the 25th December following. The objection that the by-law must be moved against in the year cannot prevail. The township of Macaulay did not within the year actively object to the union of the portion of the township with Bracebridge. They, as appears in the case, acquiesced in the union. The by-law also is invalid on its face in omitting to provide that it was not to take effect until the 25th December following.

J. G. Scott, Q. C., for the Minister of Education.

September 5, 1878. HAGARTY, C. J.—The main question is as to the effect of the by-law of the township of Macaulay, passed in October, 1875.

Bracebridge had been an incorporated village since the 1st of January, 1875. School section No. 1 of Macaulay, at the date of the incorporation, comprised the village and a portion of the township. The school house for that section was within the boundaries assigned to Bracebridge.

The statute then in force was 37 Vic. ch. 28, O. Sec. 74 provided that the school boundaries of a village rural school section or other school division, existing at the time of its incorporation, &c., shall be considered as the school boundaries of the newly incorporated village or town until such boundaries are altered under the Act. The by-law declared that two-thirds of the school sections of the township had declared for the abolition of school sections, and that all the schools in the township should be under one system, &c. It then enacted that the division of the township into school sections be abolished, and the schools in

the township be under the management of a board of trustees, &c.

The by-law made no special mention of the part of the township then united with Bracebridge, nor of the portions united with the adjoining township of Stephenson. This by-law has never been quashed, though nearly three years old.

I am not prepared to hold that it is void on its face, nor on account of any formal objection taken on the argument. It was passed on a subject within the jurisdiction of the council, and has been acted on for several years. Nor do I see any sufficient defect of jurisdiction or absence of the necessary legal conditions to authorize its adoption by the council.

The main argument was, that there was not the necessary concurrence of two-thirds of the sections.

For Bracebridge it was insisted that there were seven sections, and the assent of four was insufficient.

We must first see if there were in fact so many sections within the meaning of the Act.

The subsequent Act of 1877, 40 Vic. ch. 16, sec. 6, sub-sec. 1, O., specially declares that it shall not be necessary that any portion of the township which forms a union with another municipality or portion thereof shall be considered in respect of the requisite number of two-thirds of the school sections of the township.

It seems to me that even under the Act of 1874, it was not necessary to count this portion united with Bracebridge as a school section of the township.

I think sec. 48 speaks only of each township section having trustees of its own. The ratepayers at a public meeting in the school section, separately called for that purpose by its respective trustees, are to express a desire that such local school sections be abolished, and that all their schools be conducted under one system and management, &c. The school of this disputed territory was in Bracebridge, and could hardly be contemplated as coming under the management of the public board of Macaulay.

Section 51 declares that such a union shall for the purposes of election of trustees be deemed one school section or division, and be considered, in respect of taxation and inspection, as belonging to the township, town or village in which the school house is situate.

Section 74 specially makes the union boundaries the boundaries of the newly incorporated village till altered.

Section 84 may also be referred to.

I am of opinion that the assent of this portion so united to Bracebridge was not necessary to be reckoned in ascertaining the two-thirds majority.

Section 50 seem to have been relied on by Mr. Bethune for Bracebridge.

I do not think it applies to a union of this kind, from its peculiar wording.

I do not understand counsel to have argued that granting the validity of the by-law, its provisions did not extend to this territory. They assumed it, I think, to be a section which had to be counted in estimating the required two-thirds majority. In that view it would, of course, be covered by the by-law.

This question was settled by the Act of 1877. Sub-sec. 7 of sec. 6 says, "After the public school board is established, the portions of the township theretofore united with an adjoining municipality, or a portion thereof, shall cease to be so united, on the first day of January next following the passing of the by-law for establishing the township board."

In the same Act, sec. 6, sub-sec. 11, "In townships where public school boards have already been formed, the same shall continue as they now are in all respects until first day January next after the passing of this Act," (1st January, 1878,) "*when the provisions of this Act shall also apply to them as if established under this Act.*"

It is stated that the Macaulay board promptly after the passing of the by-law erected a school house in the territory, which has always since been open and attended.

The Act of 1874 (sec. 48) declares that on the passing

of the by-law all the public schools of the township shall be managed by the one board. This school was of course not in existence when the by-law was passed. The subsequent legislation of 1877, already cited, has to be considered.

Under it, at all events, the territory united to Bracebridge was not to be considered in estimating the required majority, and on the passing of the by-law the union was to be dissolved. So that practically the territory had no voice in the matter.

Having arrived at the opinion that the by-law had the effect of abolishing school sections, and uniting all under one board, the remaining question would be whether this disputed territory fell within its provisions.

As already noticed, I do not think this was argued; but I presume we must notice it.

Under sec. 48 (*b*) of the Act then in force, after providing for the board of five trustees, it enacts that one of them shall be chosen in and for each ward, if the township be divided into wards; and if not so divided then the whole number of the trustees shall be chosen in and for the whole township.

This would point at the selection by the entire body of ratepayers, including those in this territory.

If a portion of Bracebridge had been included in a union with one of the Macaulay sections and the school house had been in the latter, the union would be considered (see sec. 51) as belonging to the township.

On the passage of such a by-law as the present, the section would be counted as consenting or objecting, but the effect would be to place all parts of the section which were in the township under the township public board. The school would at once come under the board (sec. 48).

As already intimated, I hardly think section 50 applies to this case. It does not seem to point to such a state of things. The first part of the section applies to unions of parts of townships. The latter part provides that in the case of towns and villages the boundaries of a union school

section may be altered by the reeves or deputy-reeves, the county inspector, and a person appointed by the public school board.

Now if the township was still divided into school sections there would be no public school board to send its representative.

The Act of 1877, 40 Vic. ch. 16, O., after providing that on the establishment of the public school board, the portions united to other municipalities should cease to be united, directs (sub-sec. 11 sec. 6) that in townships where public school boards have already been formed, the same shall continue as they now are in all respects until 1st January, 1878, when the provisions of that Act shall also apply to them as if established under the Act. Reading this coming after the sub-sec. 7, providing that when such board is established the portions so united should cease so to be, it seems difficult not to hold that under this Act at least the establishment of the board under the old by-law did not necessarily (at all events from 1st January, 1878) effect the restoration of this territory to the township of Macaulay.

An already existing board is to continue, and from a named date certain new effects are to be given to it, one of them being the severance of the portions of the township from the adjoining municipalities.

At all events, from 1st January, 1878, the subsequent legislation would seem to clearly disunite the territory. But on the whole I think it may be considered as disunited under the original by-law.

The questions submitted to us by the Minister of Education are as follows:

1. Whether the territory in the case mentioned as having been united with the Bracebridge school section is, upon the fact stated, still united to the said Bracebridge section?

To this we answer, "No."

1. If the whole of such territory is not now so united, is the portion which, at a meeting of the county inspector, the reeves of Bracebridge and Macaulay, and of the representatives of the school board, was set off as to be

retained by Bracebridge school section, now united to such section?

To this we also answer, "No."

For obvious reasons we do not discuss certain matters in the case bearing on legal proceedings instituted or pending.

GWYNNE, J.—By 23 Vic. ch. 49, sec. 2, O, it was enacted that on the incorporation of a part of any school section within the limits of a village, the municipal council of the township within the limits of which such school section is in whole or in part situated should have authority forthwith to attach the part or parts of such school section, not included within the limits of the village corporation, to an adjacent school section or school sections, or to form them into a separate section or sections.

By the Consolidated Public School Act of 1874, 37 Vic. ch. 28, sec. 48, O., it was enacted that every township should have authority to pass by-laws: 1. To abolish the division of a township into school sections, and to authorize the establishment of a public school board for the township in case a majority of the resident assessed freeholders and householders, in at least two-thirds of the school sections of the township, at public meetings in the school sections separately called for that purpose by the respective trustees of every section, or by the county inspector, express a desire that such local sections should be abolished, and that all their schools should be conducted under one system and one management like the schools in cities and towns. And by paragraph (a) of that section it was enacted that on the passage of such a by-law all the public schools of the township should be managed by a board of five trustees, who, when elected in the manner prescribed in the Act, it was by paragraph (d) enacted, should be a corporation under the name of "The public school board of the township of _____, in the county of _____," and shall be invested with the same powers and be subject to the same obligations as trustees in cities and town by the eightieth section of the Act. This word "eightieth" is here inserted

by mistake plainly for the 86th section, which section it is which defines the powers and obligations of public school boards.

The 85th section enacts that the school trustees for each city, town, incorporated village or division, shall be a corporation under the name of the public school board of the city or town, village or division, as the case might be.

And by the 86th section it was enacted that it should be the duty of the public school board of every city, town, and incorporated village or division respectively, among other things, sub-sec. 5, to do whatever they may judge expedient with regard to purchasing or renting school sites and premises, and to building, repairing, furnishing, warming, and keeping in order the school houses.

And by sub-sec. 6, to appoint (in towns and incorporated villages only) a representative of the board to meet with the mayor, reeve or deputy reeve, and county inspector, to make any alteration which may be proposed in the school boundaries of such town or village.

Sub-sec. 7.—To determine the number, sites, kind, grade, and description of schools to be established and maintained in the city, town, village or division.

Sub-sec. 11.—To prepare from time to time and lay before the municipal council an estimate of the sums they think requisite for all the necessary expenses of the schools under their charge.

And by sec. 87, to appoint annually, or oftener, if they judge it expedient, and under such regulations as they think proper, a committee of not more than three persons for the special charge, oversight, and management of each school.

The public school boards of townships were thus by the 48th section invested with all the powers which by the 86th section were vested in the public school boards of cities and towns.

The 74th section of 37 Vic. ch. 28, O., seems to be a substitutional provision for section 2 of 23 Vic. ch. 49, and enacts in effect that where a part only of a rural school section

becomes incorporated as a village or town, the part not so incorporated becomes nevertheless part of the village or town for school purposes, and the whole of the former rural school section becomes in fact, and is designated, the school division of the village or town, and is under the exclusive control of the public school board of the village or town until the boundaries of such school section or division should be altered under the provisions of the Act.

Upon the incorporation therefore of the village of Bracebridge in January, 1875, what had been school section No. 1 of the township of Macaulay ceased *wholly* to be a school section of the township of Macaulay, and became *wholly* the school section or division of the village of Bracebridge. So, in like manner, with the portions of Macaulay which I understand the case to state were legally constituted part of a school section in Stephenson, these by section 84 became for school purposes part of Stephenson and constituted no part of any school section of Macaulay; but by the 48th section it is the majority of the resident assessed freeholders and householders in at least two-thirds of the school sections of *Macaulay* who had power to pass the by-law constituting a public school board for Macaulay, and the effect of the by-law, as it appears to me, clearly was not only to abolish all the school sections of Macaulay, but to place the *whole* of the township under the control of the school board of the township so constituted, although parts of the townships might have until then formed portions of the school section or division of a town or village incorporated within the township, or of a school section within an adjoining township.

40 Vic. ch. 16, O., in my judgment, but expresses upon this point in clearer language what was the proper construction to be put upon 37 Vic. ch. 28, O.

I am of opinion therefore that the effect of the by-law mentioned in the special case to have been passed by the township of Macaulay was to detach effectually that portion of the township outside of the limits of the village of Bracebridge, which upon the incorporation of the village became part of the school division of the village, from such

school division, and to place it under the control of the public school board of the township. And I am of opinion further that it has ever since continued to be, and still is, under the control of that board, notwithstanding what is mentioned in the case to have taken place in November, 1876.

It was contended that what was then purported to be done was authorized by the 50th section of the Act; but I am of opinion that neither the 50th nor the 84th section gives effect to what is stated to have been then done.

The 50th section seems to me to confer power only to alter the boundaries of *already existing* union school sections, firstly, in the case of townships; secondly, in the case of towns and villages. This latter provision, I apprehend, was introduced perhaps to meet the case or cases of towns or villages, or a town and a village in adjoining townships, or in the same township, separated only by a road; but what may have been the object of the provision seems unimportant, for 40 Vic. ch. 16, contains all the provisions regulating the formation of union school sections in the future.

For the purposes of this special case, it is sufficient to say that in November, 1876, there was no union school section then existing comprising within its limits the piece of land in question, or any part of it, so as to enable the 50th section to apply.

The by-law having had the effect which I think it had, the township, exclusive of the village municipality, was under the exclusive control of the public school board of the township, and the village under the exclusive control of the public school board of the village.

The 84th section appears to me to provide for the case of uniting part of a township or parts of townships divided into school sections—that is to say, not yet placed under the control of township public school boards—with an adjoining town or village; and the person referred to therein under the description of a “person appointed by the public school board concerned,” appears to me to be a person appointed

by the public school board of the town or village. The persons to effect such a union are the reeves or deputy reeves of the township or townships, the county inspector or inspectors, and a person appointed by the authority having control over the schools of the town or village, namely, the public school board of the town or village. Once a by-law is legally passed by virtue of which a public school board of a township is constituted, I do not think there was any authority in 37 Vic. ch. 28, O., for the union of a part of the township under such school board into a school section with a town or village. That purpose could have been only effected, as it seems to me, by another by-law of the municipality repealing the by-law in virtue of which the public school board of the township became constituted, and bringing back the township to its former condition of a division into school sections. 40 Vic. ch. 16, sec. 6, sub-sec. 10, O., makes provision for this purpose. Whether or not sec. 11 of the same Act may also apply for the like purpose, it is unnecessary to decide; but in any case a by-law of both municipalities would be necessary.

GALT, J., concurred.

MASON V. BURROWS ET AL.

Memorandum of agreement—Alteration—Evidence as to true agreement—Costs.

The plaintiff and defendants having actions respectively pending against one another, agreed to settle the same upon certain terms, the written memorandum whereof stated that the plaintiff, in consideration of defendants' payment of \$1,150, and all costs of the two suits, discharged the defendants from the suit pending against them and all claims whatever, and concluded that it was distinctly understood that defendants should pay all costs incurred by the plaintiff for witness fees and disbursements in connection with the two suits. The defendants alleged that when the memorandum was drawn up there was inserted after the words all costs of the two suits, the words, "except the lawyer's expenses of the said party of the first part" (the plaintiff): that these words had been struck out by the plaintiff or on his behalf after execution; and that under the agreement defendants could only be called upon to pay the witness fees and disbursements.

Held, on the evidence set out below, HAGARTY, C.J., dissenting, that the erasure took place prior to execution, but that the memorandum did not contain the true agreement of the parties, for that such agreement was that the plaintiff was to be paid all the costs of the two suits except the counsel fees. The plaintiff was therefore held entitled to such costs, which the Master was directed to tax, and for which the plaintiff was to have a verdict.

The first count of the declaration, after reciting two several actions pending, the one at the suit of the plaintiff against the defendants, and the other at the suit of the defendants against the plaintiff, alleged that for the purpose of settling all matters in dispute between them in both of the said actions, the plaintiff and the defendants duly signed and executed an agreement in writing in the words and figures following, that is to say:—

"This agreement entered into the thirtieth day of April, A.D. 1877, between Charles Mason, of the township of Tuckersmith, in the county of Huron, Farmer, of the first part, and James Burrows, of the township of Scarborough, in the county of York, and Thomas H. Hall of the said township of Scarborough, of the second part, witnesseth, that the said party of the first part—in consideration of the sum of \$1,150 to be paid to him by the said parties of the second part, in manner following, viz.: the sum of \$700 cash, and the balance of four hundred and fifty dollars, a claim or debt held by the said parties of the second part against the said party of the first part, and all costs of two suits entered into Court, one by the party of the first part,

and the other by the parties of the second part—agree, and by these presents agreeth to discharge the said parties of the second part from the suit now pending and all claims whatsoever. It is distinctly understood by the parties hereto that the said parties of the second part shall pay all costs incurred by the said party of the first part for the witness fees and disbursements in connection with the said two suits.”

(Sd.) D. McDONALD.”

(Sd.) “CHARLES MASON.”

(Sd.) “JAMES BURROWS.”

(Sd.) “T. H. HALL.”

The declaration then averred that the costs incurred by the plaintiff in the action of the plaintiff against the defendants were taxed at \$400.59, whereof the defendants had notice, and that the costs incurred by the plaintiff in the action brought by the defendants against the plaintiff amounted to \$172, whereof the defendants had notice; and for a breach alleged that the defendants had not paid to the plaintiff the said costs of the said two actions in the said agreement mentioned for all costs incurred by the plaintiff for witness fees and disbursements in connection with the said two suits, nor any part thereof, although duly required to do so, and the same remain due and unpaid.

The second count, after reciting the action brought by the plaintiff against the defendants, alleged that in consideration that the plaintiff would abandon the said action, and discharge the defendants from the said action, and from all claims whatever in respect thereof, the defendants promised the plaintiff to pay him \$1,150 and all costs of the said action, and all costs of the defence of a certain other action then pending in the Court of Queen’s Bench, and prosecuted by the defendants against the plaintiff, and all costs incurred by the plaintiff for witness fees and disbursements in connection with both said actions: that thereupon the plaintiff abandoned his action against the defendants and discharged the defendants therefrom, and from all claims whatever in respect thereof, yet the defendants, although they have paid said sum of \$1,150, have

not paid the said costs, witness fees and disbursements of both said suits, or of either of them, or any part thereof, although duly demanded.

The common *indebitatus* counts were added.

Pleas to the first count: 1. That defendants did not make, sign, or execute the said agreement as alleged.

2. Upon equitable grounds, that the agreement between the plaintiff and the defendants was in the words and figures following: "This agreement," &c., setting out the agreement as in the declaration, save that, immediately *before the* words therein "agree and by these presents agreeth to discharge" are inserted the words, "*except the lawyer's expenses of the said party of the first part;*" and the plea then proceeded: And the defendants say that the agreement and intention of the parties to the said agreement was, that the defendants should pay to the plaintiff the actual disbursements or money out of pocket for witness fees and disbursements made in the cause, but not the attorney's or lawyer's fees, and that after the making and execution of the said agreement the plaintiff, or some one on his behalf, altered the said agreement by striking out the words therein, "*except the lawyer's expenses of the said party of the first part;*" and making the said agreement to read as in the said first count set out, which alteration was a material alteration, and was made without the consent or knowledge of the defendants; and the defendants say that they have always been ready and willing, and have offered to pay to the plaintiff all costs incurred by him for witness fees and disbursements in connection with the said two suits, but the plaintiff has refused to accept the same, and claimed full costs in accordance with the terms of the said agreement in its altered shape.

To the second count: 3. That defendants did not promise as in that count alleged.

To the common counts: never indebted.

The cause was tried before Burton, J. A., without a jury, at Goderich, at the Spring Assizes of 1878.

What took place at the trial sufficiently appears in the

written judgment of the learned Judge, transmitted with his verdict, wherein he says :—

“The instrument on which the plaintiff declared in the first count, appears to have been altered by the striking out the words, ‘except the lawyer’s expenses of the party of the first part;’ and he declares upon it in its altered form. The onus therefore was thrown upon the plaintiff of shewing that the alteration was effected previously to the completion of the instrument, but the subscribing witness was unable to state when the words were stricken out, although he says that when he read it over there was an exception referring to lawyer’s fees.

“A number, in fact all, of the witnesses who speak of the understanding arrived at, say that there was an exception of something, and looking at the improbability of the defendants’ version of the agreement in connection with their offer previously made, \$500 and all costs, I was inclined at the trial, and am still inclined to believe, that the plaintiff’s version of the transaction, viz., that the defendants were to pay all costs with the exception of counsel fees was the correct one, but I do not see how I could so find in the face of the receipt written almost contemporaneously by Mr. McDonald.

“The parties came down to trial upon this issue, and although I might, if clearly satisfied with the evidence have allowed an amendment upon terms, there would be no use in amendment unless I was prepared to find in favour of the plaintiff on the amendment being made.

“If the plaintiff had declared on the original agreement averring that by lawyer’s fees were meant the counsel fees, I should, in the absence of the evidence furnished by the receipt drawn up by Mr. McDonald, which was unexplained, have held that the words were inadvertently struck out before execution, but upon the issue here presented I think I am compelled to find for the defendants, and for the reasons stated I do not think that any amendment I could make would benefit the plaintiff.

“It is a singular case altogether. Mr. McDonald, who

added the words to the agreement, is a taxing officer well acquainted with the meaning of the word costs, and that they would include "witness fees." If then the words now struck out were so struck out when he added the words, "It is distinctly understood," &c., it is difficult to understand the necessity for adding them. On the other hand, if these words were then in the agreement, he might have supposed that it was necessary to point the exception so as to preserve the right to witness fees, but this again is assuming that "lawyer's expenses" were not confined to counsel fees.

"I have the less reluctance in finding as I do, as it is open to the Court to enter the verdict which I ought to have given, and I trust they will find less difficulty than I have done in dealing with the case.

"For the reasons given I enter a verdict for the defendants."

In this term, May 30, 1878, *Richards*, Q.C., obtained a rule under the Law Reform Act, calling upon the defendants to shew cause why the verdict for them should not be set aside, and a verdict entered for the plaintiff for \$572.69, the plaintiff's costs in the two suits mentioned in the declaration, or for the sum of \$371.06, the disbursements in said suits, or for the sum of \$133, the witness fees in said suits, or for such other sum as the Court might direct, on the ground that on the evidence the plaintiff was entitled to recover for the costs of the two suits, except the counsel fees, or if not so entitled, then for the disbursements in the said suits, or for the witness fees: that the defence relied on at the trial was not made out; and why such amendment of the declaration should not be made as might be necessary to meet the case as established by the evidence; or why there should not be a new trial on the ground of the verdict being against law and evidence in the particulars above mentioned, or on the ground of the learned Judge having refused to allow the witness McDonald to be recalled.

In this term, June 7, 1878, *M. C. Cameron*, Q. C., shewed cause. The question turns upon the fact of whether the erasure of the words "except the lawyer's expenses," &c., took place before or after the execution of the agreement. The weight of evidence would shew that the alteration took place afterwards. The fact of all the corrections in the agreement, except this one, being initialled by the subscribing witness, is strong evidence in support of this view, and the subsequent receipt corroborates it. The cases are clear that if the alteration was made subsequently, then the plaintiff has failed to prove the agreement sued upon, and the action fails: *Halerow v. Kelly*, 28 C. P. 551; *Davidson v. Cooper*, 13 M. & W. 343; *Burchfield v. Moore*, 3 E. & B. 683; *Croockewit v. Fletcher*, 1 H. & N. 893.

Richards, Q. C., contra. The proper construction of the evidence is, that the words in question were struck out prior to execution. The agreement is therefore in the same shape now as when it was executed. The written agreement, however, does not express the true contract, and this can be shewn by parol evidence. No doubt parol evidence is inadmissible to add to or vary a written agreement, but it is clearly admissible where the object is, as here, merely to prove the true contract, or to shew that the written agreement does not express the intention of the parties. The written agreement is merely the memorandum of the oral contract previously entered into. The plaintiff independently of the written agreement is entitled to prove the oral bargain. The evidence here shews that the agreement was that the plaintiff was to be paid the costs except the counsel fees, and he is therefore entitled to a verdict therefor: *Pattinson v. Luckley*, L. R. 10 Ex. 330.

September 5, 1878. GWYNNE, J.—The case is, no doubt, in some respects, singular and very embarrassing, but I trust that recent legislation, notwithstanding the form of the counts and issues upon which the parties have come down to trial, does invest us with sufficient power, if it be

necessary to exercise it, to do what appears to be just between the parties, and to give effect to their intention.

For the purpose of doing complete and final justice between the parties to any action at law, we are empowered to pronounce such judgment and to make such order or decree as the equitable rights of the parties respectively require, and as fully to dispose of the rights and matters in question as a Court of equity could. An equitable right may now be asserted and enforced in a Court of law equally as in a Court of equity if the Court of law is of opinion that it can in the particular case do complete justice; and we are empowered at any time during the progress of any action at law, upon the application of any of the parties, and without such application, to make all such amendments as may be necessary for the advancement of justice, the prevention and redress of fraud, the determining the rights and interests of the parties, and of the real question in controversy between them, and best calculated to give judgment according to the very right and justice of the case: R. S. O. ch. 49, secs. 5, 6, 8.

Before proceeding further I desire at once to say that, acting as a juror, as I am obliged to do, as well as a Judge in this case, I am thoroughly convinced by the evidence that the striking out the words, which the defendants in one of their pleas to the first count set up in bar of the plaintiff's right to recover, was an act *not* done either by the plaintiff or by any one on his behalf; and I am in like manner convinced that whether it occurred before or after the actual signature of the instrument by the respective parties thereto, it occurred through the ignorance or inadvertent act of one or other of the gentlemen who, at a very late hour of the night, when professional assistance could not be obtained, and in order to expedite the completion of the instrument so that the defendants might return home, undertook a task which, as appears now, neither of them was competent to accomplish perfectly.

For my own part, after the most careful consideration I can give to the evidence, I am prepared to find as a fact,

that the erasure took place before signature, although the effect was undoubtedly not understood, nor perhaps observed.

Mr. McDonald, the subscribing witness, alleges that it was placed in his hands for safe keeping for *all* parties immediately after its execution, and that it remained in his hands until the next morning, when in the office of Mr. Cameron, the plaintiff's attorney, he laid it down upon a desk in the presence of Mr. Cameron and the plaintiff. There is no reason to suppose that the erasure took place during this interval while the instrument was in Mr. McDonald's care. However, Mr. McDonald swears that it was not altered in this interval; and I understand Mr. Cameron's evidence to be, that he then took up the instrument and read it, and that it was then as it is now; and that he then pointed out to Mr. McDonald the discrepancy between the middle clause, which says plaintiff is to get all costs, and the last clause which says he was only to get witness fees and disbursements; and as to the plaintiff having had an opportunity to make the erasure there does not appear to be a peg upon which to hang a suspicion.

If I understand Mr. Cameron's evidence correctly, coupling it with Mr. McDonald's, the natural explanation would seem to be that the erasure occurred without having been noticed, through the bungling of one or other of the gentlemen engaged in preparing the instrument, and at the time of its being prepared.

There is also other evidence which, in my judgment, supports this view, and which explains sufficiently to my mind the manner in which it is probable that the erasure took place.

Cheney says that when McDougall wrote down to the part "lawyer's expenses," there was some altercation took place then. He says, "I think there was some objection made." Whether McDougall got fogged or Mr. Mason, he cannot say; "but when Mr. McDonald came in he dictated an addition, and made some alteration."

Mason says he did object to the expression excepting

"lawyer's expenses," in consequence of a conversation he had had that day with Mr. Cameron his attorney, that what he wanted put in was that he was to be paid all costs except fees to his own counsel at the Court, "*the pleading fees*." Mr. McDonald recollects his using the expression. And Mason further says that when McDonald came in and undertook to make the instrument right to meet Mason's views, which McDonald admits he understood as the plaintiff now contends for, he made a motion with his finger to McDougall telling him to strike out something and to put in something. Then McDougall admits that there were alterations and additions made, and although he does not recollect striking out these words, yet they appear to him to be erased with the same ink as the writing, and at the same time, and with the same pen: that there was some reason in consequence of something passing when McDonald came in to explain his being applied to, to correct something objected to, I think there can be no doubt. When McDonald came in and looked over the document, he spoke to the plaintiff to receive some explanations from him, and McDougall said that McDonald observed that putting in the addition at the end, which McDougall inserted at McDonald's dictation, would explain *it more* definitely and *make it* more clear. All this evidence appears to my mind to go very far towards establishing that in consequence of some objection having been made as to the expression "lawyers expenses" of the party of the first part, McDougall either inadvertently or intentionally struck out the words, either in consequence of the objection before McDonald came in, or by McDonald's direction; and that in the hasty manner in which the new mind introduced brought the instrument to that state of perfection which would enable it, as it is said he remarked, "to hold water now," words were omitted to be substituted in lieu of those erased so as to carry out the real intention of the parties; and the result is that, reading the instrument as it stands, with the words erased, it does not conform to the intention of the parties, and to

enforce it in that condition would be injurious to the defendants, and they are the persons to set up that the agreement as signed does not conform to the intention of the parties. Reading it with the words which have been erased restored, unless the expression "lawyer's expenses" should be construed to be limited to "counsel fees" only of the party of the first part, still it would not conform to the intention of the parties, and to enforce it in any other sense than as entitling the plaintiff to all costs except those of counsel fees, would be injurious to the plaintiff; and to give effect to the literal meaning of the clause added by McDonald, the plaintiff would be entitled to these counsel fees as disbursements, while he himself admits he was not to be entitled to them.

The rule in *Pigot's Case*, 11 Co. 27, and in *Master v. Miller*, 1 Sm. L. C., 7th ed., 871, 917, has been extended to all instruments comprehending words of contract.

In *Powell v. Divett*, 15 East 29, it was applied to the case of bought and sold notes altered by the plaintiff's broker after execution.

The rule as now received may be said to be that an alteration after execution made by one claiming under a contract, or by his privity, destroys the instrument as to him so that he cannot sue upon it.

In *Davidson v. Cooper*, 13 M. & W. 343, Lord Denman C. J., says at p. 352: "The strictness of the rule on this subject, as laid down in *Pigot's Case*, can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that the principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part."

It may be, however, that the form of pleading may preclude a defendant from making any objection.

In *Hemming v. Trenery*, 9 A. & E. 926, where a contract was interlined, and the plaintiff declared upon it as in its

original state, the defendant having pleaded non-assumpsit only, was not allowed to rely upon the interlineation.

That case was approved of and relied upon in *Mason v. Bradley*, 11 M. & W. 590, and in *Calvert v Baker*, 4 M. & W. 417, where in an action upon a bill, declared upon as it was originally accepted, the defendant was allowed under a plea denying the acceptance to rely upon an alteration in the bill. It is put in the note to *Master v. Miller*, 1 Sm. L. C., 7th ed., 871, upon the ground that a new stamp was rendered necessary by the alteration; and in *Parry v. Nicholson*, 13 M. & W. 778, it was held that an alteration in a bill of exchange which does not render a new stamp necessary, cannot be set up as a defence under the plea of non-acceptit, but must be specially pleaded.

Where, however, the plaintiff declares upon the instrument as altered, the defendant may raise any defence arising out of an alteration under a plea denying the contract, for if he has not authorized the alteration, he has not made the contract declared upon.

Now here the plaintiff declares upon the contract as complete with the erasure,—that is, as if the erasure had been made before execution,—and the defendants, besides denying that they made such a contract, plead to the first count a plea averring the contract as made to have contained the words which are erased, and averring the erasure to have been made by the plaintiff or by some person on his behalf since the execution of the contract.

I have already expressed my opinion to be, and have given my reasons for that opinion, that the erasure was neither made after the execution of the contract, nor was it made by or on behalf of the plaintiff, but that it was made during the preparation of the contract by the ignorance, carelessness or want of skill of the parties who prepared it, and who failed therein to express the real intention of the parties,

The defendants having then failed to establish the gist of this plea, the issue thereon should be found for the plaintiff.

We have then a plea, the issue joined upon which is not

established to be as pleaded by the defendants, wherein the defendants admit that the plaintiff is entitled to recover to the extent at least of the amount paid for witness fees and disbursements.

Now, if that plea stood alone as the only one pleaded, the plaintiff would undoubtedly be entitled to a verdict technically and substantially to some amount, although not for the full costs of both actions as claimed in the declaration; for the plaintiff's evidence shews that by the real contract as actually entered into, and as intended to be expressed in the instrument, he was not to be paid the full costs of these actions, but such costs less the amount of his counsel's fees; but if the plea stood alone, the plaintiff being entitled to a verdict on the issue joined thereon, we can secure justice being done to the defendants by ordering the bills to be taxed in the sense contended for by the plaintiff's evidence, which, in my judgment, shews the real contract between the parties.

But the defendants did also plead non-assumpsit to the contract as set out in the declaration. If the erasure had been made since the execution of the instrument by the defendants, the defendants would be entitled to prevail upon the issue joined upon that plea. That issue raised the same question as was raised by the special plea, namely, whether or not the instrument when signed was as alleged by the plaintiff in his declaration, that is to say, not having the erased words forming part of the contract. In other words, were the words which appear to have been erased, erased before or since the execution of the contract by the defendants? It raised no question as to whether or not the instrument, either with or without the erased words, truly represented the contract the parties had really agreed upon and intended to be expressed in the instrument. The question was not what the document was intended to mean, but in what condition was it when signed.

Now although the evidence does, in my judgment, clearly establish that the document as declared upon was not what either the plaintiff or the defendants intended it

should be, the same evidence which satisfies me that the issue joined upon the special plea ought to be found for the plaintiff, satisfies my mind that the erasure was not made after execution of the instrument ; and that therefore the plaintiff is entitled to a verdict in his favour upon this issue also, not to the full amount of costs as claimed in the declaration, but the Court can limit his recovery to the true amount of costs, which by the contract, as it was actually entered into and as was intended to be expressed in the instrument, the defendants were to pay.

Then as to the second count, the plaintiff does not set out the written contract. The question upon that count is a question of evidence, and is, was such a contract as is there alleged, made between the parties so as to entitle the plaintiff to recover anything thereunder. In support of this contract the plaintiff produces the signed document. The question then arises again, was the erasure made before or after the defendants signed the instrument? I think for the reasons already given it was before the signature, so that technically again the plaintiff proves the contract as set out in the count. It lies then on the defendants to urge that the instrument does not truly represent the contract. Giving them the benefit of this contention, we should not deprive the plaintiff of the benefit of the instrument which he produces signed by the defendant to any greater extent than to confine him to the benefit of the contract as it was in truth made, which, as I have said, I believe to be as stated in evidence by the plaintiff. Technically then the plaintiff is entitled to recover in the view which I take, and we can do complete justice between the parties by limiting the plaintiff's right to recover to his costs exclusive of counsel fees.

Now in such a case as this should the effect of the receipt referred to by the learned Judge in his judgment, be to deprive the plaintiff of his right to recover the costs as really claimed by him, namely, his costs of the two actions less the amount of his counsel fees ; and should it enable the defendants to go free also from payment of the amount

of costs which they admit to be due by them, but in satisfaction of which they have paid nothing into Court, although they say they have always been ready and willing to pay them? I cannot think it should have any such effect. Doubtless an expression in a receipt cotemporaneous with a contract affords matter proper to be considered as shewing the intention of the party signing it; but if the evidence is abundant to satisfy Court and jury that the instrument drawn for the purpose of evidencing the contract was through ignorance, or want of skill, or carelessness or mistake of the parties drawing the instrument so drawn as not to express the real intention of the parties to the contract, and does not accord with the instructions given to govern its frame, and for such reason it should be reformed so as to express the real intention of the parties to the contract, surely a receipt prepared, not for the purpose of containing the contract, and which is affected with the same taint of ignorance, want of skill, carelessness, or mistake shall not estop the party signing from claiming that redress which he would be clearly entitled to when he is not estopped by the instrument itself which was prepared with the intention of expressing the contract, which intention has been defeated by ignorance, carelessness, and mistake.

The receipt is in these words :

“GODERICH, 13th Sept., 1877.

“Received from Messrs. Burrows & Hall, a pro. note dated this day for \$700, in full of my claim against them, save and except the costs and disbursements incurred and expended by me in witness fees in a suit now entered by me at the present Huron Assizes against them. On their undertaking to pay such witness fees, I hereby undertake to withdraw such suit.

(Signed)

“CHARLES MASON.”

Now it is to be observed that Mr. McDonald, who drew this receipt, and who was the subscribing witness to the instrument just signed, was only asked to draw for the defendants a document to shew down in Toronto, so that the lawyers could withdraw their record. He says he drew

up the receipt, but he does not know that it embodied all the agreement. Why it alters the agreement altogether, and professes to bind the plaintiff to such alteration, and reading it, no one would suppose there had been any other written agreement upon the subject. By the instrument just previously signed this gentleman had suggested the addition to what McDougall had prepared, as follows: "It is distinctly understood by the parties hereto that the said parties of the second part shall pay all costs incurred by the said party of the first part, for the witness fees and disbursements in connection with the said two suits." Now note it is the costs incurred for witness fees *and* disbursements in connection with the two suits, indicating clearly that there were other disbursements besides witness fees to be paid by the defendants. In his evidence he admits that he understood the agreement which he was a party to, having expressed in the instrument to be, that the defendants were to pay \$700 in cash, or give a note at a month, abandon a suit at Toronto which the defendants had against the plaintiff, wherein they claimed \$450, pay the plaintiff his costs except his lawyer's *pleading fees*, that is, pay the plaintiff's costs in both suits; and he says that he understood from the plaintiff that by "lawyer's pleading fees" he meant "counsel fees," yet in the receipt he makes the plaintiff say that the \$700 was in full of his claim against the defendants, save and except the costs *and* disbursements incurred and expended *in* witness fees *in the one suit*. To construe the expression "the costs *and* disbursements incurred and expended" to express the same thing, namely, the witness fees, would be senseless tautology. Consistently with Mr. McDonald's admission as to what he understood the contract to be, it would more accord with such his knowledge to read the word *costs* in connection with "incurred," and the words "disbursements" with "expended in witness fees,"—thus "save and except" the "costs incurred," for he understood the defendants were to pay all costs except "counsel fees" "and disbursements expended in witness fees," thus providing

for both costs and disbursements—the former incurred, the latter expended. It would, as it seems to me, be a very hard measure of justice to deal out to the plaintiff if we should hold that this duplication of bungling exhibited in this receipt should deprive him of all right to payment of those costs and disbursements, which I am perfectly satisfied the defendants did contract to pay.

I have thus given at considerable length my reasons for thinking that we can upon the record as it stands, and consistently with the evidence, render a verdict in favour of the plaintiff upon the issues without violation of any technical rule, and that as to substantial justice we can secure that by ordering the bills to be taxed, disallowing the counsel fees.

The plaintiff in no part of his evidence claims anything more than this—his declaration is framed asking full costs. Reading the instrument as it appears with the sentence erased that is what appears to be contracted for; but the plaintiff never in any part of his evidence contended that that was intended. Receiving the instrument, as I have no doubt he did, from the hands of Mr. McDonald, in the condition in which it now appears, no other mode of declaring was perhaps open to him at law than to declare upon the contract according to its construction. Having no reason at any rate to suppose that the instrument had been tampered with after its execution, it was natural that the declaration framed upon the instrument should accord with the frame of the instrument. But if it should be thought that the question whether the erasure was made before or after execution is not so free from doubt as to entitle the plaintiff to recover upon the issue denying the making of the contract as it is declared upon, I cannot doubt but that there is a mode of declaring, which, under the circumstances appearing in evidence, would entitle the plaintiff to recover upon equitable considerations; and I think that if it should be deemed necessary we should *ex abundanti cautela* allow a count to be added *nunc pro tunc* so framed as to be supported by the evidence already given.

In such a count, as it seems to me, the plaintiff should aver the true agreement as it was verbally made, and as I find it to have been established by the evidence, namely, that the defendants were to pay the plaintiff all his costs of both actions except his counsel fees, and the breach of such contract: that to accommodate the defendants, and at their request, the plaintiff consented to have the contract so made reduced to writing, and signed at a late hour of the night when professional assistance could not be obtained: that accordingly, and because professional assistance could not be obtained, the parties, because of their own incompetance, employed two persons, whom they believed to be competent, to reduce the above contract to writing: that however by reason of the incompetence, want of skill, carelessness, and mistake of the persons so employed an instrument was drawn up as containing the above contract, but which did not truly and correctly express it, and which the parties under the erroneous belief that it did, signed. It should then pray that the instrument so signed may be reformed so as to express the true contract, and that the plaintiff may recover thereupon for the breach thereof assigned, *or* that the plaintiff upon proof of the true contract by oral or other sufficient evidence, may recover thereupon, and that the defendants may be restrained from setting up or insisting upon the said instrument, so as aforesaid erroneously drawn up and signed by the parties under the erroneous belief that it truly represented the contract as actually agreed upon.

This seems to me a more fit frame of a count than one setting out the instrument with the clause which has been erased restored in consequence of the ambiguity involved in the expression "all costs except the lawyer's expenses." An averment that by the expression lawyer's expenses, the parties *meant* only "counsel fees," would not aid, for if that be not the natural meaning of the word the plaintiff would be as far off from recovering as ever, for neither equity nor law allows a party by oral evidence to shew that

by the language used in an instrument he understood or meant something different from what the language expresses. To construe an instrument by extrinsic oral evidence of what a party meant different from what is expressed, is not permissible; but he may shew that the instrument as framed is not what it was intended to be, and does not express the intention and agreement of the parties, if he can satisfy the Court that this is so.

For my own part, however, I am of opinion that the evidence is sufficient to justify a verdict for the plaintiff upon the issues joined, and that being so, the Court can do justice to all parties by referring the plaintiff's bill of costs to the Master, with directions to him to allow all costs of the actions, except counsel fees, and the verdict and judgment thereon will be entered for the amount when so taxed.

HAGARTY, C. J.—I have not been able to see my way to the decision arrived at by my learned brothers. The opinion I now express is given with much hesitation. It is very probable that their view may do substantial justice between the parties.

My difficulties are these.

1. I am not able to arrive at the conclusion on the evidence that the words in question were struck out as they now appear in the agreement signed. I would rather arrive at the contrary opinion. The subscribing witness cannot speak with clearness, and it is a strong circumstance against that view that he carefully initialled five other alterations, all of minor importance, leaving this uninitialled.

2. I do not feel that the evidence is so clear in favour of the plaintiff's view as to warrant any Court in reforming a written agreement.

If there had been no writings, I might perhaps, as a juror having to decide one way or the other, incline to the plaintiff's contention. But where the parties have reduced or professed to reduce their agreement to writing, as a general rule such writing ought certainly to turn the scale in favour of the bargain as there set down.

If not there would practically be no use in a written agreement, if it must always be construed by the recollections of the litigants and their friends as to what they intended and what they supposed their opponents understood was intended.

The written agreement was generally supposed to reduce all this verbal discussion to a final shape, to make order out of disorder.

Where it is clear that the document fails to express the true bargain the wholesome jurisdiction of reforming it can be properly exercised.

I do not think the evidence here warrants such interference. The receipt signed by plaintiff very distinctly seems to argue against such a course. The affidavit of plaintiff's witness Cheney is very positive as to the clause about costs not being struck out, and must be considered in connection with his evidence. I also think this receipt may be used to explain what the parties meant by the words "witness fees and disbursements" and confine them to disbursements to witnesses.

I feel strongly the difficulties as pointed out by my Brother Gwynne in the very unfortunate wording of the agreement, looking at it in almost any light.

It may be that the suggestion of reading "except the lawyers expenses" to mean "except the counsel fees" might come nearer to the true meaning of the parties, and I am not disposed to regret that a majority of the Court can arrive at a conclusion in accordance therewith.

I agree that the plaintiff should recover his disbursements to witnesses.

GALT, J., concurred with GWYNNE, J.

Rule accordingly.

THE PETROLIA CRUDE OIL AND TANKING COMPANY V.
ENGLEHART.*Agreement—Reformation—Evidence.*

The defendant applied to the plaintiffs to purchase from them 10,000 barrels of crude petroleum oil, for exportation; and the plaintiffs, at a meeting of their board at which defendant was present, passed a resolution accepting defendant's application for the purchase of the said oil for exportation, and that he was not to offer any refined oil for sale up to 15th July, 1877, provided the London Oil Refining Company should make an arrangement with the plaintiffs and continue their monopoly till that date: this proviso being added at defendant's instance. An agreement under seal was then drawn up and executed by the parties, containing a stated sum as liquidated damages for a breach thereof, but omitting the above proviso.

The president of plaintiffs' company said, but the defendant denied, that he told the defendant at the meeting that the contract must be absolute, and that he, the president, would not have signed it otherwise. He instructed the plaintiffs' solicitor to draw it without the proviso, and the defendant so executed it, believing, as he swore, that it contained the proviso, his attention not having been specially called to the omission. Afterwards the arrangement, which had been made with the London Oil Refining Company, was put an end to, and the monopoly ceased to exist.

In an action by the plaintiffs to recover the said damages for breach of the agreement, in selling crude and refined oil in the Dominion:

Held, upon the above facts, and upon the evidence set out below, that they could not recover: that the resolution, which had not been rescinded by any corporate act of the plaintiffs, must govern: that the defendant should have been informed of the omission; and that the defendant was entitled to have the instrument reformed by inserting the condition.

THE declaration contained three counts.

First count: That by a deed, dated the 20th of September, 1876, the defendant covenanted to buy from the plaintiffs 10,000 barrels of good merchantable crude petroleum oil, at and for \$1 per barrel, which the defendant covenanted to pay as each 1,000 barrels were delivered; and that the defendant therein further covenanted with the plaintiffs that the said 10,000 barrels of oil, or so much thereof as should be delivered by the plaintiffs to the defendant, should be manufactured into illuminating refined oil: that the whole of the refined oil manufactured therefrom should, within six months from the date of said agreement, be *bonâ fide* exported out of the Dominion of Canada, and that the same should not, nor should any part

thereof, be placed on the Canadian home trade market, or used or consumed in the provinces of Ontario or Quebec, or any other province of the Dominion of Canada: that for each and every barrel of the said crude petroleum which should not be manufactured and exported as aforesaid, the defendant covenanted to pay the additional sum of \$2 per barrel: that they delivered to the defendant the whole of the said 10,000 barrels in manner as in the said agreement provided, yet that the said petroleum was not manufactured into illuminating refined oil and the whole of the refined illuminating oil manufactured therefrom exported out of the Dominion of Canada within six months from the date of said agreement, but that a large portion of said petroleum, to wit, 5,000 barrels, was placed on the Canadian home trade market, and was used and consumed in the Provinces of Ontario and Quebec, and in the other Provinces of the Dominion of Canada, whereby the defendant became liable to pay for such 5,000 barrels the said additional sum of \$2 per barrel, but that the defendant has not paid the same.

Second count: that the defendant, in consideration that the plaintiffs would sell to the defendant the said 10,000 barrels of crude petroleum in the first count mentioned at the price therein mentioned, in and by the said deed covenanted with the plaintiffs that from and after the date thereof, and until the 15th day of July then next ensuing, he the defendant, would not, directly or indirectly, either alone or jointly with any other person, or as the agent of any other person, sell or dispose or permit to be sold or disposed of for the Canadian home trade market, any refined illuminating petroleum oil which had been manufactured in whole or in part at the refinery of the said defendant. And the said defendant in and by the said deed covenanted and became bound, for the due performance of his said covenants, to pay to the plaintiffs the sum of \$10,000 as liquidated damages and not in the nature of a penalty. And the plaintiffs allege that in breach of the covenants of the defendant in this count mentioned, the defendant did directly and in-

directly, both alone and jointly with one Guggenheim, sell and dispose, and permitted to be sold and disposed of for the Canadian home trade market, a quantity of illuminating refined petroleum oil, to wit, 10,000 barrels, which had been manufactured in part at the said refinery, whereby the defendant has become liable to pay to the plaintiffs the sum of \$10,000.

Third count: that at the time of entering into the agreement hereinafter in this count mentioned, the plaintiffs were dealers in and producers of crude petroleum, and had customers who were accustomed to purchase from them from time to time large quantities of crude petroleum oil for the purpose of manufacturing into refined illuminating oil for sale in the Canadian market, and from the sale of which said crude oil the plaintiffs derived large profits, and the extent of the said sales and profits derived therefrom were liable to be and were much affected by the quantity of crude petroleum oil which was manufactured into refined illuminating oil and sold in the Canadian market by persons competing with the said customers of the plaintiffs in the said Canadian market; and at or about the time of entering into the said agreement hereinafter in this count mentioned, the defendant, who had notice of all the facts hereinbefore stated, applied to the plaintiffs for the purchase from them of 10,000 barrels of crude petroleum oil to be manufactured into refined illuminating oil for export beyond the limits of Canada, and the plaintiffs agreed to sell the said oil at \$1 per barrel, which was less than the market price of crude petroleum oil intended to be manufactured into refined illuminating oil to be sold in the Canadian market, upon the express agreement and understanding that the said defendant would, so as to prevent the said crude oil or any other crude oil of which the said defendant might before the 15th day of July then next become possessed from coming into competition in its raw or manufactured state with the plaintiffs or their said customers in the Canadian market, enter into the covenants hereinafter mentioned; and the plaintiffs, as the

defendant well knew, would not have sold the said oil to the defendant but for the advantage which they expected to have derived from the performance by the defendant of his said covenants. And thereupon the defendant, in consideration that the plaintiffs would sell to the defendant the said 10,000 barrels of petroleum, in and by the deed in the first count mentioned, covenanted with the plaintiffs that he, the defendant, would not sell or dispose of any crude petroleum oil in its crude state prior to the 15th of July next ensuing the date of the said deed to any person or persons whomsoever other than to the plaintiffs, except the same were sold for the export market solely, (meaning thereby to be sold and removed for use and consumption out of the Dominion of Canada,) and did thereby also covenant that he, the defendant, should only be free from a breach of the said covenant, provided that *all* the refined oil which might be manufactured from any of said crude oil should be actually and *bona fide* exported from the Dominion of Canada prior to the said 15th of July; or if not so exported, provided that the same should not be placed, sold, or put upon the Canadian home trade market, or used or consumed in the said Dominion prior to the said day. And for the performance of the covenants in this count mentioned, the defendant covenanted to pay and became bound to the plaintiffs in the sum of \$10,000 as liquidated and ascertained damages, and not in the nature of a penalty. And the plaintiffs allege that the defendant, in breach of his said covenants, did, before the said 15th day of July, sell and dispose of a large quantity of crude petroleum oil, to wit, 10,000 barrels, to divers persons other than to the plaintiffs and for other markets beside the export market, and a large quantity of such crude petroleum oil so sold, to wit, 10,000 barrels thereof, was manufactured into refined illuminating oil before the 15th day of July, and was not exported from the Dominion of Canada, but, on the contrary, was placed, sold, and put upon the Canadian home trade market, and was used and consumed in the said Dominion prior to said day, whereby the defendant has

become liable to pay to the plaintiffs the said sum of \$10,000. And the plaintiffs claim \$20,000.

Pleas :

To the first and third counts: 1. *Non est factum*.

To the first count: 2. That the plaintiff did not deliver the 10,000 barrels as alleged.

3. That the 10,000 barrels was manufactured into refined illuminating oil, and the whole of such refined oil was exported out of the Dominion of Canada within six months from the date of the said agreement.

4. That 5,000 barrels of such oil was not, nor was any part thereof, placed on the Canadian market or consumed in any of the Provinces of the Dominion of Canada, as alleged.

To the second count: 5. That the defendant did not directly or indirectly, either alone or jointly with Isaac Guggenheim, sell and dispose of, or permit to be sold or disposed of for the Canadian home trade market illuminating refined petroleum oil which had been manufactured in part at the defendant's refinery as alleged.

To the third count: 6. That the defendant did not, in breach of his covenant, sell and dispose of crude petroleum oil to divers persons other than to the plaintiff, and for other markets than the export market before the said 15th day of July.

7. That he did not in breach of his covenant, sell crude petroleum oil which was manufactured into refined illuminating oil before the said 15th day of July, other than that which was actually and *bonâ fide* exported from the Dominion of Canada.

To the whole declaration, upon equitable grounds: 8. That prior to the time of the making of the deed in the several counts of the declaration referred to, and which deed is one and the same deed, a company carrying on the trade or business of oil refining in Canada, and known as the London Oil Refining Company, had entered into an agreement with the plaintiffs whereby the said London Oil Refining Company had agreed to purchase a certain quan-

tity of crude petroleum oil from the plaintiffs, and had secured the monopoly of the sale of refined oil within the Dominion of Canada, and the said London Oil Refining Company were at the time of making the said deed in treaty with the plaintiffs for the continuance of such monopoly; and the defendant thereupon proposed to purchase from the plaintiffs 10,000 barrels of crude petroleum oil, and the plaintiffs then offered to sell the same to the defendant, upon the condition and agreement that in case the said arrangement with the said London Oil Refining Company should be entered into by that company and the plaintiffs and the said company should continue their said monopoly under the said arrangement up to and until the 15th day of July, 1877, the said defendant should manufacture the said 10,000 barrels of oil into refined oil, and export the same beyond the Dominion of Canada, and that the defendant should not offer refined oil for sale within the Canadian or home trade market up to or until the said 15th day of July, 1877, in case the said London Oil Refining Company should continue their monopoly until then; and the defendant accepted the said offer upon the condition and agreement aforesaid. And the defendant says that through error and mistake in the preparation of the deed in the declaration mentioned, and which said deed was intended to express the true agreement between the plaintiffs and defendant, the condition and agreement herein aforesaid was omitted from the said deed, and was not set forth therein as the same should have been. And the defendant says that although the said arrangement with the said London Oil Refining Company was entered into by that company and the plaintiffs, and it was understood that the said London Oil Refining Company should continue the said monopoly up to and until the said 15th day of July, 1877, yet the said London Oil Refining Company did not continue the said monopoly until that day, but long before the 15th July, 1877, the said London Oil Refining Company abandoned their said arrangement with the plaintiffs, and determined their said monopoly, by reason

whereof the defendant, under the terms of the true agreement made between the plaintiffs and defendant, and under the condition and agreement hereinbefore set forth, was no longer required to export the said oil beyond the Dominion of Canada, but was at liberty to offer the same for sale in the Canadian home trade market. And the defendant says that so long as the said London Oil Refining Company continued the said monopoly the defendant did not offer refined oil for sale in the Canadian or home trade market, but in all things observed and performed the terms of the said deed and agreement. And the defendant prays that the said deed may be reformed and amended by inserting the said condition and agreement in this plea hereinbefore mentioned to have been erroneously and by mistake omitted therefrom, and for such further and other relief in the premises as may seem just.

Upon these pleas the plaintiffs joined issue.

The cause was tried before Armour, J., without a jury, at London, at the Spring Assizes of 1878.

The evidence so far as material is set out in the judgment.

The following is, in substance, the finding of the learned Judge at the trial.

The chief question in this case is, whether there was any obligation upon the plaintiffs' president to inform the defendant, that in the preparation of the agreement of the 20th of September, the proviso in the resolution of the 8th of September, "providing the London Oil Refining Company make an arrangement with the Petrolia Crude Oil and Tanking Company, and continue their monopoly to that date," had been left out; and whether the *mere omission* to do so was, under the circumstances of this case, a fraud such as in the view of a Court of Equity would avoid the agreement. The defendant before he executed the agreement, as I find, did in fact read over the agreement and knew its contents, and it was his own negligence or forgetfulness that prevented his observing the omission of the proviso. He has derived all the benefit derivable from

the agreement, and it would be impossible to place the parties in *statu quo ante* were the agreement set aside; and I think it would be very dangerous to hold that, on the oath of the defendant alone, that he would never have signed the agreement, had he known of the omission, and after he had received the full benefit of the agreement, he should be excused from fulfilling it on his part. Unless such mere omission to inform the defendant that the proviso was left out be a fraud sufficient to avoid the agreement the defendant must be bound by it, for otherwise *there was no fraud whatever*, nor was there any mutual mistake by which the agreement would be rectified, or calling for its rectification. The defendant is an intensely shrewd, sagacious man, and I think it exceeding strange that if he placed the great importance upon this proviso that he swears he did, he should have failed to observe its omission, and I am almost constrained to believe, in spite of his oath, that he did not place so great a value upon the proviso as not to consent to its omission rather than lose the chance of getting for \$10,000 the oil, which I find was at the date of the agreement of the value of \$15,000, and which as he had sold 'short' it was of the utmost importance to him to get. Besides, the president, who gave his evidence throughout in a very candid manner, and whom I entirely believe, swears that he told the defendant, after the passing of the resolution, and on the same night, that the agreement must be absolute till the 15th of July, (or, in other words, that the proviso must be left out.)

I find therefore that the omission by the president to inform the defendant that the proviso had been left out of the agreement was not, under the circumstances of this case, a fraud such as in the view of a Court would set aside or nullify the agreement.

I find therefore in favour of the plaintiffs.

I find also that the defendant committed not only a breach of his agreement in putting refined oil on the Home market before July 15th, 1877, but that he also committed a breach of his covenant contained in the fifth paragraph

of the agreement ; and I am clearly of opinion that he is liable to \$10,000 as liquidated damages for the breach of each covenant.

I find therefore a verdict for the plaintiffs, and I assess the damages on the first and second counts at \$10,000, and on the third count at \$10,000, in all \$20,000.

In this term, May 22, 1878, *J. K. Kerr*, Q. C., obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict for the plaintiffs, and to enter a verdict for the defendant.

During the same term, June 6, 1878, *Robinson*, Q. C., shewed cause. The agreement is legal and binding. There was no fraud or mistake in its execution, and there is no ground for reforming the instrument. Reformation of an instrument must be either on the ground of mutual mistake, or that the person seeking relief was misled or deceived, and it must be clearly shewn what the agreement was ; also where the agreement has been entered into and acted upon, and a benefit obtained thereunder, as was the case here, a very strong case must be presented to cause the Court to interfere. None of the requisites are shewn in this case. The learned Judge has expressly found that the defendant read over the agreement before executing it, and that if he failed to observe the omission it was his own negligence or forgetfulness that prevented his doing so ; and that he had derived all the benefit derivable under the agreement, and that it would be impossible to put the parties in *statu quo*. He also found that the president told the defendant that the proviso must be omitted, and he was of opinion that, instead of the defendant placing any great value on the proviso, he was fully prepared to consent to its omission rather than lose the chance of getting the oil which it was so important for him to get. Even if the defendant did not read the agreement through before signing it, he had at least every opportunity of doing so ; and he could not have thought that the resolution was to govern, for, among other things, the large amounts provided for as liquidated damages

are not mentioned in the resolution, and to them no objection has been taken: *Campbell v. Edwards*, 24 Grant 152; *Dawson v. Graham*, 41 U. C. R. 532; *Taylor* on Evidence, 7th ed., p. 951, sec. 1139; *Pollock* on Contracts, 2nd ed., 450. The next point is that the damages must be construed as liquidated and not in the nature of a penalty. This is just the case where it must be held to be liquidated damages, as there are no means of ascertaining what the damages are: *Mayne* on Damages, 2nd ed., p. 99; *Sainter v. Ferguson*, 7 C. B. 716; *Atkins v. Kinnier*, 4 Ex. 776, 783; *Chitty* on Contracts, 11th Amer. ed., 1314; *Sedgwick* on Damages, 6th ed., p. 489; *R. & J. Dig.*, 2742; *Leggett v. Mutual Ins. Co. of New York*, 50 Barb. 616; *Mott v. Mott*, 11 Barb. 127; *Add.* on Contracts, 7th ed., 368.

J. K. Kerr, Q. C. contra. The evidence shews that the agreement was entered into through mistake, or that the defendant was misled or deceived into entering into it. The resolution of the company, on which the agreement is based, contains the proviso, and this was communicated to the defendant and assented to by him; and on the faith of this proviso being contained in the agreement, and in ignorance of its omission, he executed the agreement. There was clearly mutual mistake. Neither the company or the defendant ever was cognizant of the omission, the omission having been made by the president of the company on his own authority. It was the duty of the president to have specially called the attention of the defendant to the omission, and the defendant was in consequence misled and deceived in executing the agreement. The real and only agreement entered into between the defendant and the company is contained in the resolution of the company; and this has never been legally varied. The omission of the proviso constitutes such a fraud in equity as entitles the defendant to relief. The defendant is therefore entitled to have the agreement reformed by the insertion of the proviso, or the plaintiffs should be restrained from suing on the agreement in its present shape. Upon the instrument so reformed, the verdict must be for the defendant.

Independently of reformation, the plaintiff has failed to prove the first count; *Wyld v. Liverpool, &c. Ins. Co.*, 23 Grant 442; *Brown v. Blackwell*, 35 U. C. R. 239; *Luce v. Izod*, 1 H. & N. 245; *Re De La Touche's Settlement*, L. R. 10 Eq. 599; *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Shier v. Shier*, 22 C. P. 147; *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223. The amount fixed for a breach of the agreement must be looked upon as a penalty, and not as liquidated damages. There is no difficulty in ascertaining the amount, as the price of oil is matter easily determinable: *Rutherford v. Stovel*, 22 C. P. 9; *Brown v. Taggart*, 10 U. C. R. 183; *Reynolds v. Bridge*, 6 E. & B. 528; *Dimech v. Corlett*, 12 Moo. P. C. 199, 229.

September 5, 1878. GWYNNE, J.—In the year 1874, divers persons in the Province of Ontario being the possessors of crude petroleum producing lands and of wells for extracting crude petroleum oil, and divers other persons being possessed of refineries for manufacturing such oil into refined illuminating oil, and being desirous of controlling the Canadian home trade for the sale of refined illuminating petroleum oil, and to that end of establishing a monopoly both in the production of the crude petroleum and in the manufacture of it into illuminating oil, combined together to effect their purposes. The *modus operandi* adopted was that the owners of the oil tanks and wells should form a company, to be called the Petrolia Crude Oil and Tanking Company, and that they should obtain, as far as possible, control over all the oil producing lands and wells by contract with the owners of such property; and that the refiners should form a company, called the London Oil Refining Company, who should endeavour to control all the oil refineries by obtaining leases thereof from their respective owners; and by the proposed joint action of these respective bodies it was contemplated to monopolize regulate, and control the home market, and thereby to raise the price both of crude and of refined oil for the mutual benefit of the respective parties so combining.

Accordingly the respective companies above named were formed for the respective purposes above named, and by a deed, bearing date the 14th day of December, 1874, expressed to be made between the former of the two, namely, the Petrolia Crude Oil and Tanking Company of the first part, and fifty-six other parties by name, "and the several other parties who have executed this agreement, other than the party of the first part, of the second part,—after reciting that the party of the first part had invested a large amount of capital for the purpose of purchasing or leasing petroleum oil wells and oil lands, and for testing, pumping, producing, buying, selling, piping, tanking, and warehousing such oil, and of transacting all business relating to petroleum oil and its products, and for establishing, erecting, and maintaining all necessary premises, buildings, works, and appliances for the proper working and carrying out of the said business in this province; and that the party of the first part was desirous of ensuring a sufficient supply at all times of the materials required for the efficient carrying out of its undertakings, and for that purpose had entered into an arrangement with the parties of the second part to secure that end, which was considered mutually advantageous—it was witnessed that the party of the first part, for itself, its successors and assigns, and the several parties of the second part, each for himself and his executors, &c., mutually covenanted and agreed as follows:—

1. The company shall for the term of three years from date take from the parties of the second part all such good merchantable crude petroleum oil as the parties of the second part desire to sell at the price of seventy-five cents for each barrel of forty-three gallons, which they shall deliver to the company at its receiving tanks, and pay for the same on the delivery of each reported lot.

2. The parties of the second part shall, during the said period, sell and deliver to the company at its receiving places all the good merchantable crude petroleum oil that they may have for sale during the said period, at and for the said sum of seventy-five cents for each barrel of forty-three gallons.

3. Whenever any of the parties of the second part have any petroleum oil to sell, they shall report in writing to the company the quantity such person proposes to sell, and thereupon the company shall direct the person when and where to deliver, and such person shall thereupon forthwith deliver as directed.

4. The parties of the second part shall not sell during the said period to any one except the company any crude petroleum oil, whether held by them now or hereafter acquired, or in which they now have or hereafter may have any interest, or which shall be produced from any lands they now have or hereafter may acquire, and shall not sell, assign, or transfer, or permit to be sold, assigned, or transferred, any oil lands or any interest in such lands in the county of Lambton which they now have or hereafter during such period may acquire, otherwise than expressly subject to this agreement.

5. That inasmuch as damages would afford a totally inadequate remedy for breach of any of the foregoing stipulations which the parties of the second part have agreed to, it is expressly agreed that in case of any actual or intended breach of such stipulations the party of the first part shall be at liberty to apply for and obtain the appointment of a receiver, without giving notice to the said parties of the second part, to secure the performance of the said stipulations.

6. The party of the first part agrees to pay at the end of each year to such of the parties of the second part as may sell oil to the company in proportion to the quantity sold by each, a commission of 90 per cent. of the net profits of the business of the company during the year.

The company shall have power at any time upon resolution of the shareholders to cancel this agreement; and the parties of the second part shall also have the right to cancel this agreement at any time by resolution of at least two-thirds of the number of the parties of the second part for the time being.

This deed was executed by the fifty-six persons named

therein as parties of the second part, and afterwards from time to time by other persons as they came into the arrangement, until eventually it was executed by one hundred and twenty-three persons.

The defendant was both a large producer and also refiner. He did not for some time come into the agreement, and when he did he was the ninety-eighth person whose name was subscribed. He did so conditionally only, although the condition is not expressed, and what the precise condition was does not clearly appear.

The London Oil Refining Company likewise procured leases to itself of a large number of the refineries, and thereupon agreements for limited stated periods were made between the Petrolia Crude Oil and Tanking Company and the London Oil Refining Company, whereby the former company supplied the latter with crude oil to be refined upon certain terms in those respective agreements specified, but what where the terms of such agreements as they existed prior to the 21st August, 1877, did not appear.

In 1875, the defendant entered into an arrangement with the London Oil Refining Company whereby he supplied them with his crude oil and leased them his refinery. This arrangement and lease terminated on the 15th July, 1876. While this agreement was in force, the plaintiffs applied to the defendant to procure him to come into the deed of the 14th December, 1874, and to sign this instrument, which was called the producers' bond. The defendant says that it was in February, 1876, when the plaintiffs asked him to sign the bond. He says that he told them, and they knew it, that he was under an arrangement with the London Company whereby they took care of his crude oil until July, 1876. He says that at length, while his contract with the London Company was in force, he signed the producers' bond upon certain stipulations. What these stipulations were is not agreed, nor is it important for the purpose of this suit what they were; but that the defendant did sign the producers' bond subject to some stipulations or conditions is admitted by the presi-

dent of the plaintiffs' company, who says: "We considered that his execution of the instrument was a qualified execution."

The president says that the stipulation was that the defendant reserved the right to export, but that if he had any oil to put into the home trade market it was to come to the plaintiffs. But I do not understand him to say that the defendant signing the producers' bond was in any way to alter or affect his agreement with the London Oil Refining Company, which was in force until the 15th July, 1876.

We have not before us this latter agreement, but from the defendant's statement as to it, it was of such a nature that the terms of the producers' bond and it could not co-exist.

The defendant states the stipulations made when he signed the producers' bond was, that if the plaintiffs would take care of his crude oil as well as of his refined oil, he would go in with them, and that if they could not do that, then his signature to the bond was to be nothing, in fact to be void. And he says that he offered the plaintiffs his crude oil, and that they would not take it, and so according to his view he was no longer to be considered a party to the producers' bond.

Now, as he says, the London Oil Refining Company had his crude oil and his refinery until the 15th July, 1876, I understand him to mean, although the evidence is not very clearly expressed, that this offer of the crude oil which the plaintiffs would not take must have been after the 15th July, 1876, when the arrangement with the London Company terminated. What the stipulation was is only of any importance here for the purpose of shewing precisely what was the relation, if any, existing between the defendant and the plaintiffs immediately upon the termination of the defendant's arrangement with the London Oil Refining Company upon the 15th July, for it is plain, I think, that the defendant then considered he was under no obligation to the plaintiffs' company by reason of his having signed

the producers' bond. At or about the termination of defendant's agreement with the London Company, he undertook the business of selling oil for export. He says that he entered into this export business as early as July or August, and he sold at that time oil upon the strength of the London Company having sold him oil at a low price for that purpose. In pursuit of this export business he had sold, to be delivered at a future time, as much oil for export as would require 10,000 barrels more of crude oil to make. This quantity he wanted to get from the London Company. That company did not wish to give it, but wanted the plaintiffs' company to let the defendant have it. In the meantime both the plaintiffs and the London Company were interested in the latter company again getting control of the defendant's refinery as affected the home market. The defendant would come to no arrangement of that nature, unless he could get the 10,000 barrels of crude oil to fill his contract. This holding out of the defendant interfered with the plaintiffs renewing their arrangement with the London Oil Refining Company, although the London Company made certain propositions for a temporary arrangement with the plaintiffs, while negotiations with the defendant to get control over his refinery as affected the home market proceeded, and upon the 15th of August, 1876, the board of the plaintiffs' company passed a resolution that proposition No. 1 of the London Oil Refining Company be accepted as a basis of agreement to the 1st of October next, provided that in the matter of Englehart oil no special specification is made entitling him to any privileges other than those expressed in the producers' bond: that the company should have the privilege of examining the books of the London Oil Refining Company to ascertain the current prices charged for refined oil, and that the stipulations for the refinery being closed be altered so that the company shall not put any refined oil on the Canadian market during the period of the agreement.

The proposition thus accepted was reduced into an agree-

ment, bearing date the 21st of August, 1876, and made between the London Oil Refining Company, thereafter called the London Company, of the first part, and the above plaintiffs, thereafter called the Petrolia Company, of the second part, whereby the London Company agreed to buy and the Petrolia Company to sell 22,000 barrels of crude oil, to be delivered as follows: 13,000 before the 15th of September, and 9,000 thereafter before the 1st of October, at \$1.25 per barrel, and one-half of all advances which during the continuance of the agreement refined oil should reach above a certain price named in the contract as the then price upon which the \$1.25 was arrived at: that the Petrolia Company should not put any refined oil of their own manufacture upon the home market during the continuance of the agreement; and that the London Company should have power to determine the agreement at any time by giving three days' notice to the Petrolia Company.

In the meantime negotiations with the defendant proceeded. Besides being a refiner he was a very large producer; and as the London Company could come to no terms with him as to controlling his putting refined oil upon the home market, unless he could get the 10,000 barrels he wanted to supply his contracts for exportation, it was a matter of importance to both companies that he should be settled with; and the London Company through their representative, Mr. Fitzgerald, had frequent communications with the Petrolia Company, as the president of the latter company admits, about the Petrolia Company coming to an arrangement with the defendant in lieu of the London Company, with whom the defendant was endeavouring to deal, and the more so because the London Company could not arrive at a definite arrangement with the defendant as to refined oil, or with the Petrolia Company, until the defendant should be arranged with to his satisfaction.

Mr. Fitzgerald, the representative of the London Company, as to this, says: "We," that is, the London Company, "arranged with Englehart to lease his refinery, and this

10,000 barrels of oil stood in the way. We were not willing to give it to him. He said he would not give a lease of the refinery until he did get them. The question was whether he should get them from us or from the Petrolia Company." And again: "As soon as the arrangement was made between him and the Petrolia Company, he and I immediately arranged our affairs as to the refinery."

In order, then, to settle this difficulty, the Petrolia Company's board was called together the day after the execution of the contract of the 21st August between the two companies for the express purpose of dealing with the defendant's matter. The minutes of the board upon that occasion, on the 22nd of August, 1876, shew that the president informed the board that the meeting had been called to consider Mr. Englehart's relation to the company, and added, "That gentleman would not lease his refinery to the London Oil Refining Company, unless his crude was provided for: that being on our producers' bond, Mr. Fitzgerald considered, as specified, in negotiation we should deal with him: that he, the president, considered we were bound to take Mr. Englehart's production from the 15th July, and that he could export at pleasure without reporting to us."

From this statement I gather that whatever were the stipulations upon which, as is admitted, the defendant signed the producers' bond, one part at least was that his signature was to have no effect whatever until after the 15th July, 1876, when defendant's contract with the London Company, who until then took charge of his crude oil, would determine.

Mr. Englehart was, it appears, in attendance at this board meeting with the view of endeavouring to agree upon some terms with the plaintiffs' company, for the minutes proceed to say that "Mr. Englehart having been called in, gave it as his impression that under the circumstances the mutual obligation expressed in the producers' bond had become void," and the minutes add, "This not being considered so,"—which means no doubt "by the

board"—Mr. Englehart made a proposition, that as he was entitled to export his own oil, he would say all was adjusted without his reporting any oil to the 1st of October, if we would sell him 10,000 barrels of oil for export at eighty-five cents, he pledging himself at the same time to export all his production. This proposition was not accepted by the board; and thereupon a resolution was proposed by one member of the board and seconded by another, and carried, "That Mr. Englehart be sold 10,000 barrels at \$1, for export at his refinery, same to be in consideration of his not reporting any oil to 1st of October, and consequent non-participation in dividend, he agreeing to export all his own oil or production to that date."

It is observable that in this negotiation the term for which the plaintiffs were making an arrangement with the defendant was proposed to be only for the extreme duration of the contract then existing between the Petrolia Company and the London Company. The resolution above carried by the board when communicated to the defendant would seem not to have been accepted by him, for at a meeting of the board, held upon the 4th of September, 1876, the minutes of that day shew that Mr. Englehart came in and addressed the board, asking them for the 10,000 barrels at eighty-five cents for export, and that if the board would sell 20,000 barrels he would give \$1 for 10,000 barrels of it: that this proposition being declined, Mr. Englehart then said he would give ninety-two and a half cents for the 10,000 barrels and close it: that the board was not willing to give the oil at ninety-two and a half cents, and that Mr. Mr. Englehart then offered \$1 per barrel for the 10,000 barrels, whereupon the meeting adjourned until two o'clock the following day for further consideration. The minutes of the 5th September shew that "the Englehart application for 10,000 barrels at \$1 was reconsidered, and no conclusion arrived at."

A meeting of the board appears to have been again held on the 8th September. The minutes of that day state that the president said the principal object of the meeting was

to consider Mr. Englehart's application to buy 10,000 barrels at \$1 : that Mr. Englehart was then heard with regard to his application : that he asked the company to give him the 10,000 at \$1, but that the board did not consider it advisable to sell at that price ; and that upon a thorough discussion of the whole market position and Mr. Englehart's relation with the company, it was moved by Mr. Chamberlain and seconded by Mr. Brake, "That Mr. Englehart's application for 10,000 barrels of oil at \$1 per barrel be accepted, providing the oil is exported, and provided it is distinctly understood that in consideration of getting the 10,000 barrels, Mr. Englehart agrees not to offer any refined oil for sale on the Canadian market up to the 15th July, 1877, provided the London Oil Refining Company make an arrangement with the Petrolia Crude Oil and Tanking Company, and continue their monopoly to that date, and that Mr. Englehart exports and in no way asks the Petrolia Crude Oil and Tanking Company to take care of any portion of his crude oil up to the 15th July, 1877."

In amendment to this proposition, it was moved and seconded, "That the matter lie over to the 1st October, and that in the event of a satisfactory arrangement with the London Oil Refining Company, Mr. Englehart to have the 10,000 barrels in the terms of the motion. The amendment was lost, and the original resolution carried, and was communicated to defendant, who accepted the same.

Now, with reference to the terms of this resolution, the evidence, I think, establishes that the condition—"Provided the London Oil Refining Company make an arrangement with the Petrolia Crude Oil and Tanking Company, and continue their monopoly to that date"—was a condition required to be introduced by the defendant and in his interest, and its introduction was necessary to the obtaining his consent to the contract involved in the resolution.

The reason of the introduction of the date of the 15th of July is explained by the defendant, and as it appears to me reasonably, to have been that his former arrangement with the London Oil Refining Company for the lease of

the refinery terminated on the 15th July, 1876, and that the one for which the London Company was in treaty, and which for its completion only awaited his settlement with the Petrolia Company, was intended to continue until the 15th July, 1877. But in whatever way the above condition became inserted in the resolution, it constituted, when the resolution was passed and accepted by the defendant, an essential part of the agreement as finally concluded between the plaintiffs' company and the defendant, and no act of the board and of the defendant assenting to any alteration in the terms of the contract, whereby that condition should be excluded, has ever taken place.

It was the act of the president alone, who gave directions to the solicitor of the company, when preparing the instrument for execution by the defendant, to omit from the instrument this condition which was contained in the resolution of the board; and I can arrive at no other conclusion from the evidence than that this act of the president was without the consent or knowledge of the defendant, and without any authority in law justifying the president's conduct; and I am quite satisfied of the truth of the defendant's testimony that he never noticed the omission when he signed the instrument produced in evidence, and that he never would knowingly have executed the instrument without the condition; and that he executed it upon the faith that the solicitor of the company who prepared the instrument had done so in pursuance of the resolution, and that no intimation whatever was given to him that the instrument, a copy of which was not furnished him, was in any respect different from the resolution.

Indeed it appears to me to be contrary to the whole intent of the negotiations, and to the object of the respective parties thereto, that the plaintiffs should attempt to bind the defendant in the manner now insisted upon beyond the time when the monopoly, which was the sole object of the establishment of both companies, should wholly cease. The negotiation with the defendant was

merely to lead up to and to facilitate the plaintiffs' company coming to a further arrangement with the London Company upon the termination of the one then in existence, and to enable the London Company to obtain a lease of the defendant's refinery so as to restrain his putting refined oil on the home market. The whole evidence shews this. While the negotiations were going on between the plaintiffs' company and the defendant from the month of August to the 8th of September, negotiations were likewise going on between the two companies through their representatives.

Mr. Fitzgerald, who was the representative of the London Company, says: "I knew that the Petrolia people knew that this 10,000 barrels was interfering with the arrangement between us. On the completion of the arrangement with Englehart we concluded our arrangement with the Petrolia Company. The instrument between us was executed on the 21st of September, but the negotiations for that took place some time previous. The two agreements were cotemporaneous. We could not have carried out the one without the other. We would not have made the arrangement with the Petrolia Company unless provision had been made for the securing of Mr. Englehart's refinery. We could not have carried out our arrangement with the crude oil people unless we had arranged with Englehart about his refinery. The two things necessarily ran together."

Upon the completion of the arrangement with Englehart an instrument was executed by him immediately upon the completion of the agreement with the plaintiffs, whereby he demised his refinery to certain persons constituting the London Company, until the 15th July, 1877, terminable at any time by the lessees, upon three days' notice, subject to certain terms whereby the lessor was enabled to use the refinery for refining oil for export only during the continuance of that agreement. The president of the plaintiffs' company says that the agreement with the London company, which was reduced to the shape of the in-

strument executed on the 21st September, was in fact agreed to upon the 19th September,—that is to say, a resolution of the Board of that day was passed, to which Fitzgerald assented on the 20th, and on that day the president procured the defendant to execute the instrument of the 20th, now sued upon, which the plaintiffs' solicitor had prepared, omitting the condition above set out and referred to in the equitable plea; and on the 21st the agreement with the London company was executed,—for the sale to them of 180,000 barrels of crude oil, which was to continue in force until the 15th September, 1877, unless terminated sooner, as it might be at any time by three days' notice given by either party. By this agreement the plaintiffs' company was restrained from selling any refined oil upon the home market, and they were to receive for their crude oil a price in excess of a minimum price agreed upon, bearing a stated proportion to the increased price from time to time which the monopoly thus secured would bring to refined oil on the home market. The Petrolia company's profit being thus made to depend upon the success of the contemplated monopoly in raising the price of refined oil on the home market, would therefore cease when the monopoly would cease by the determination of the agreement.

Now the plain inference to be drawn from all this evidence, as it appears to me, is, that it was the undoubted intention of all the parties to these respective contracts that the defendant was to be bound only until the 15th July, upon the assumption that his contract with the London company should continue until then, and provided the agreement between the Petrolia company and the London company, whereby they expected to control the price of oil upon the home market, should so long continue in force. And I am of opinion that defendant's equitable plea is established, and that the condition which formed part of the actual contract between the plaintiffs and the defendant having been omitted from the sealed instrument executed by the defendant, and now sued upon, and having been left out of that

instrument by conduct which, in the eye of a Court of Equity, was wrongful, should be inserted in that instrument, which should be now read as if it contained that condition, or the plaintiffs should be restrained from suing upon it in its present shape, stripped of the condition which in the agreement as actually made by the defendant with the plaintiffs' board, was an essential element in the contract.

Independently of such reformation of the instrument sued upon as prayed by the equitable plea, the defendant is, as it appears to me, clearly entitled to a verdict upon the first count. The complaint in that count is, that the whole of the produce of the 10,000 barrels of crude oil in that count mentioned, all of which, as is alleged, was delivered to the defendant, was not exported out of the Dominion of Canada. The defendant pleads that it was. By the evidence of the defendant, which is not contradicted, it appears that only 9,000 barrels of this oil was delivered to the defendant directly, and that the other 1,000 barrels was delivered by the plaintiffs to one Waterman, a refiner. As to the 9,000 barrels delivered to the defendant there is no suggestion that any part of the produce of it was not exported, and the defendant swears that it all was. And as to the 1,000 barrels delivered to Waterman, I think that upon the evidence of William Biddell, the book-keeper of Mr. Waterman, it sufficiently appears that the refined oil representing that 1,000 barrels was exported. Whatever claim the dealings in evidence of the defendant with Waterman, since February, 1877, might give to the plaintiffs to recover upon the third count, if the instrument of the 20th September was to govern without the omitted condition, I think it plainly enough appears that the plaintiffs have failed to establish the gist of the complaint in their first count, namely, that a large portion of the said 10,000 barrels of petroleum were placed upon the Canadian home trade market, and was used and consumed in the Dominion of Canada. That involves an affirmative allegation, the onus of proof of which

lay upon the plaintiffs. This they have failed to prove, and, in my opinion, it is sufficiently disproved,

As to the two other counts, the instrument being treated as reformed by the insertion of the condition, as I think it must be, the plaintiffs must fail upon both of these counts: 1. Upon the plea of *non est factum* alone, as the condition which is an essential part of the contract is not set out in the count, and so the covenant declared upon is unsupported by the covenant in the reformed instrument; and 2. Because the acts relied upon as breaches of the covenants in these counts took place after the termination of the monopoly upon the notice given by the London Company to that effect upon the 15th February, 1877. After the termination of that contract, whereby the London Company ceased to control the home market, and publicly advertised to that effect and announced the reduction of refined oil to fifteen cents per gallon, and afterwards to ten cents, as appears by the evidence, the defendant became by the terms of his agreement with the plaintiffs, which were wrongfully by the plaintiffs' act withheld from the instrument now sued upon, freed from the obligations of that instrument, as it ought to have been drawn, and as it reads when reformed.

That this was really the intention of the parties appears to my mind upon the statement in the plaintiffs' counts, especially the third, wherein they state what they had in view in making their contract with the defendant, and the object of that contract to be to prevent the defendant by competition with the plaintiffs' customers, to wit, the London Company, affecting the profits derived by the plaintiffs from the sale of crude oil to that company under the plaintiffs' agreement with that company, which profits were enhanced by the plaintiffs obtaining control of the quantity of the crude oil sold for home consumption. Now when the London company by dissolving their agreement with the plaintiffs, and as they did also their agreement with the defendant, and by reducing as they did the price of refined oil, and publishing to the world the dissolution

of the monopoly which had existed, threw open to every one the home market, there would be no sense in the defendant continuing bound to the plaintiffs; moreover it was his agreement that he should not be. The instrument, therefore being read as if it contained the condition wrongfully omitted, the verdict should be for the defendant upon the second and third counts as well as upon the first.

The plaintiffs' president says that he would not have signed the instrument if it had contained the condition upon which the defendant relies; but I do not see that the president had any right to withhold his signature from a contract in the terms which had been agreed upon between his board and the defendant, and were expressed in a resolution of the board accepted by the defendant. However, the point here is that the procuring the defendant's signature under the circumstances appearing in evidence to an instrument as containing the contract as expressed in the resolution of the board which contained the terms of the only contract made with defendant, but omitting an essential part of those terms as expressed in the resolution of the board, and attempting to enforce such instrument upon the defendant, is such a fraud in equity upon the defendant that this Court in the exercise of the equitable jurisdiction now conferred upon it, will relieve against.

HAGARTY, C. J.—On the evidence it seems to stand thus: At the meeting of the 8th September, the matter was fully discussed, and at last a resolution was passed by a majority of the directors setting out the contract with the defendant, and containing the proviso now in dispute. This proviso was specially introduced at the defendant's instance, and on the evidence appears to have been a matter of vital importance to him, and without it I think, he would never have entered into the contract. Mr. Jenkins, the president, afterwards instructed his solicitor to draw up a formal agreement and to omit this proviso.

He says, "We told him on the night of the meeting that the contract would have to be drawn absolutely; we did

not tell him afterwards ; we did not consider the resolution the final thing. As a matter of fact we had no minute in our book requiring that the proviso should be struck out."

The defendant was told on the night of the meeting that the solicitor would draw the agreement. When it was prepared, Mr. Jenkins took it to the defendant, and said, "Here is the document ready for execution. I do not think that I called his attention to the fact that the proviso had been omitted ; I did not think it was requisite. * * He examined the agreement. He opened it and began at the top of the page and read it until he was satisfied, and then signed it." Witness could not say whether the defendant read it through. The defendant signed it without comment, and witness took it away and completed it immediately. No copy or duplicate was given to the defendant. Witness says he did not call his attention to the omission, because he understood that defendant knew that these were the terms, and if no fault had been found with them it was not witness's business to call attention to it. The execution was on the 20th of September. After the solicitor had prepared the agreement, it lay for some days in the board-room or office, and there was a meeting of directors.

Jenkins says the contract was read as prepared by the solicitor ; and that they all knew it had been drafted absolute. They considered it to their advantage to have it absolute.

The defendant most distinctly asserts that he was never told and never heard of any alteration or departure from the resolution, or that the proviso was to be omitted or the contract absolute ; that he always thought the resolutions contained the contract ; that when he executed, he glanced at the contract and ascertained that the prices and quantities were correct ; that on his asking Jenkins, was it correct, Jenkins said yes, and he signed it. He saw it had been prepared by Moncrieff, the solicitor, in whom he had confidence ; that he would not have signed had he known that the proviso was omitted ; and until just before the com-

mencement of the suit, (August 1877) ten or eleven months afterwards, he never heard or knew of its omission. The minutes of the 18th of September, shew that the contract as drafted by the solicitor was read. Mr. Jenkins does not say that he specially called their attention to the omission of the proviso, but that they all knew it had been drafted absolute.

Looking at the very peculiar nature of this bargain, (so clearly explained in the judgment of my brother Gwynne,) I feel constrained to say that if the case rested solely on the evidence of Mr. Jenkins and of the defendant, I, as a juror, could not hold that the agreement actually signed contained the true contract between these parties.

I do not think it right to treat this case as if it were a personal contract between two individuals, say Mr. Jenkins and the defendant. The defendant was dealing with a board of directors of a public body, no one of which had power to bind their corporate action. The fact of the strong difference of opinion amongst these directors as to the bargain to be made with the defendant, shews the necessity of looking to the evidence of their assent as a company, viz., the resolution, and less to any verbal statement said to have been made that evening, that the contract was to be absolute.

It is well to examine closely what the other directors stated.

Mr. Macdougall says he opposed the resolution, but it was carried with the proviso. "It was never subsequently rescinded that I am aware of. I am not aware that it was ever determined that that clause in the resolution should be struck out." He does not know that the company ever did anything to get rid of the proviso. Again he says in answer to a question, if the board did anything to get rid of the proviso. "Yes, we adopted the agreement subsequently without it. I do not know that our attention was called to the fact that the proviso was not in it. I think that that point was discussed. I know that it was individually, and I think it was in the board * * We talked

of it individually, different members of the board in discussing the general interests of the company * * We adopted the agreement as it was finally drafted by the solicitor. I examined it with the other directors, and was satisfied that it was an agreement we were willing to submit to. Question: "Was it such an agreement as you were satisfied Englehart had agreed to." Answer: "On the general terms. There might be a little variation in regard to that provision." Q.—"Was it such an agreement as you thought had been arranged for." A.—"I was under that impression at the time, we all came mostly every day, and the agreement was there for our consideration."

The evidence of Messrs. Gibson and Noble throws no light on the matter one way or the other. They were called by the plaintiffs.

Another director, Mr. Macdonald, gives evidence wholly in favour of the defendant. He voted against the resolution; but he clearly understood the bargain as defendant contends. He was present at the meeting of 18th September, but does not remember the drafted agreement being submitted. Nothing was said about it containing anything different. He does not consider the agreement as executed is in accordance with the resolution, with the sentiments of the board, and he does not think it right to hold the defendant to it.

Mr. Brake, a director, says that he had no idea at any time that the proviso had been abandoned or altered in any way. He remembers the defendant thanking the directors after the resolution was passed. He did not hear Jenkins saying anything as to that the contract should be absolute.

It will be observed that on the plaintiffs' part, besides Mr. Jenkins, Messrs. Macdougall, Noble, and Gibson, also were called from the board of directors. These two latter gentlemen certainly proved nothing whatever against the contention that the resolution adopted by the board was the true basis of the dealing with the defendant.

Mr. Macdougall's evidence has no very certain tone. I

have given his words. He is clear as to the passing of the resolution, and the absence of any proceeding rescinding or altering it. He cannot say that the attention of the board was called to the absence of the proviso in the draft. He talked over the agreement with the directors individually, and was satisfied that the agreement was such as they might sign, &c. Messrs. McDonald and Brake adopt the defendant's view.

I feel compelled to hold on this evidence that the resolution as passed was the only binding contract entered into by these parties, unless clear and convincing proof was offered by the plaintiffs that the defendant executed the deed knowing that the proviso had been omitted. If he did, he would of course be bound by its terms, as if no previous negotiation had taken place. His assent as well as that of the plaintiffs would be amply evidenced by its execution. But the only witness examined (Mr. Jenkins) will not undertake to swear that the defendant read the document through. He says he did not call the defendant's attention to the absence of the proviso or to any variations in it, and that it was not his business so to do. The defendant emphatically swears that he did not read it and had no idea of any variation.

Here then we are brought face to face with the difficulty on the evidence. He had, we think, the right to assume that the agreement presented for his execution was fairly drawn in accordance with the contract he had entered into. He had confidence in the character of the professional gentleman who drew it. Can we believe that he knowingly assented to the omission of a provision so very important as he asserts to his interests? I confess my inability to accept such a view.

But then it is said that Jenkins told him after the resolution was passed, that the contract as to exporting must be absolute. He denies this, and there is no corroboration of Jenkins's statement to the contrary. Such a contradiction illustrates strongly the wisdom of the principle that calls on us to look at the written formal expression of the

terms of agreement between parties, instead of loose verbal declarations and assumed qualifications asserted on one side and denied on the other.

We will suppose that on the passing of this resolution the defendant had formally in writing accepted it, and then Mr. Jenkins, as he asserts, told the defendant that it must nevertheless be absolute, (*i. e.*, without the proviso) and the defendant afterwards refused to complete or perform it,—I think the company, on the evidence before us, could never succeed in compelling him to perform it without the proviso—apart from any difficulty in compelling performance of a contract with a variation.

Or again, we will suppose the proviso had been a matter highly advantageous to the plaintiffs, but the defendant swore that afterwards he told them the proviso must be omitted, which they denied: that he agreed to have a formal deed prepared and had it drawn omitting the proviso, and the company executed it just as the defendant is sworn to have executed here,—I think the company would have had a clear equity to have such deed reformed, as soon as the omission came to their notice, and they could point to the resolution they had passed as the only evidence of their corporate action, and as the only contract they had agreed to be bound by.

I think the defendant can say here, that the real bargain between him and the company is contained in that resolution, and was never legally varied.

If the bargain of the 8th of September had been between the six directors who were examined here as private individuals on the one hand and the defendant on the other, and that a memorandum of the bargain was drawn up in the terms of this resolution, I entertain a very strong opinion that, on hearing all the evidence given here a jury would properly come to the conclusion that the memorandum in writing was the true and only bargain, and that in the absence of clear proof of the known execution of an agreement omitting an important provision of that memorandum, the party against whose interest it

had been omitted was not bound thereby, or was entitled to have it reformed in accordance with the true contract.

I think the principles laid down by the House of Lords in *Proprietors, &c., of English and Foreign Credit Co. v. Arduin*, L. R. 5 H. L. 64, cited by us in *Bickford v. Great Western R. W. Co.*, 28 C. P. 516, at p. 547, as to calling parties special attention to variations in agreements, are worthy of consideration in a case like the present.

GALT, J., concurred.

Rule absolute.

PARSONS V. THE QUEEN INSURANCE COMPANY.

Insurance—Verbal agreement for—Interim receipts—Warehouse receipts—Insurable interest—Wool—Prior insurance.

The plaintiff, a hardware merchant, as also a large wool buyer, discounted paper with his bankers for wool purchases on the security of warehouse receipts therefor, and at the same time he signed and delivered to the defendants' local agent, who was also the bank agent, applications for insurance on the wool to be held by the bank as further security. The agent either charged the plaintiff with the amount of the premiums in his bank account or received it in cash, but did not then fill in defendants' printed form of interim receipt, or sign a written receipt or contract of any kind professing to bind the company, stating that he was too busy to do so. He informed the head office of the insurances, but not of the mode of effecting them, and after the loss remitted the amount of the premiums and wrote out and signed receipts, copying an old printed form. There was no evidence of any express authority to the agent to enter into verbal contracts, while the applications stated that the insurances were on the usual terms and conditions of the company. One of the conditions of defendants' policy was, that no receipt or acknowledgment of insurance should be binding, unless made by and on one of defendants' printed forms, and signed by their authorized agent. In an action on equitable grounds setting up insurances by the interim receipts.

Held, that the causes of action were not proved.

Held, also, that even if the policy should be deemed to be without conditions, the conditions endorsed not being in accordance with the statute, still these conditions might be looked at with reference to the agent's authority, as being a public declaration of defendants' proposed mode of dealing with the public.

Where warehouse receipts given on goods are transferred to a bank as collateral security for discounts.

Held that the insured has still an insurable interest in the goods.

The policy sued upon was effected on large quantities of wool purchased during the wool season, and kept separate from the plaintiff's general stock in a warehouse called the wool house. A prior insurance in another company was on a general stock of goods, which included wool pickings, being small quantities purchased out of the wool season and kept in the general storehouse.

Held that this should not be deemed to cover wool purchased during the wool season.

This was an action on three insurances alleged to have been effected by the plaintiff with the defendants' company.

The declaration contained three counts.

First count: On a policy of insurance against fire, dated 30th June, 1877, alleging an insurance from 23rd June, 1877, to the 23rd August, following, for \$1000, on a stock of wool, the property of the plaintiff, and contained in a one-story frame building covered with shingles, owned by the plaintiff, and occupied by him as a storehouse, situate and being on the south side of Broadway, in the town of Orangeville, bounded as and further described in the application for said insurance, and alleging loss by fire to the amount insured, and non-payment.

Second count: And for a cause of action upon equitable grounds, the plaintiff says that upon the 15th June, 1877, the plaintiff applied to the defendants, being an Insurance Company duly incorporated and doing business in the Province of Ontario, for an insurance against loss or damage by fire on a stock of wool, the property of the plaintiff, and contained in a one story frame building covered with shingles owned by the plaintiff, and occupied by him as a storehouse, situate and being on the south side of Broadway, in the town of Orangeville, in the Province of Ontario, to the amount of \$2,000, for a period of three months from said 15th of June, and on the said date paid to the defendants through one A. M. Kirkland, the duly authorized agent of the defendants, at the said town of Orangeville, for the purpose of receiving premiums, of issuing premium and interim receipts and protection notes of the defendants, in terms of the receipt or note hereinafter set out, and of binding the defendants by contracts of insurance, the sum of \$20, being

the amount of premium for said insurance for said period of three months at the usual premium rates of defendants, whereupon the said agent of the defendants, being authorized as aforesaid, and having power as aforesaid to bind and intending to bind the defendants thereby, granted on behalf of the defendants to the plaintiff a receipt or note in writing in the words and figures following :

“ Fire Department.—Interim Protection note.

“ Queen Fire and Life Insurance Co.

“ Orangeville Agency, 15th June, 1877.

“ No. 26.

“ Mr. William Parsons having this day proposed to effect an insurance against fire, subject to all the usual terms and conditions of this Company, for \$2,000, on the following property in the storehouse in Orangeville, for three months, namely, on a quantity of wool, and having also paid the sum of \$20 as the premium on the same, it is hereby assured under these conditions until the policy is delivered or notice given that the proposal is declined by the Company, when this interim note will be thereby cancelled and of no effect.

“ A. M. KIRKLAND, Agent to the Company.

“ N. B.—The deposit will be returned, less the proportion for the period, on application to the agent signing this note, in the event of the proposal being declined by the Company. If accepted, a policy will be prepared and delivered within thirty days. If the holder does not receive a policy during the specified period, he should apply to the head office in Montreal.”

And the plaintiff further avers that said receipt or note, became and was binding upon the defendants and operated from said date in law and in equity, as an insurance upon the said stock of wool to the sum of \$2,000, for the said period of three months, unless within such period a policy of insurance of the defendants upon the said stock of wool for the amount, upon the terms, and for the period specified by said receipt or note should be delivered to the plaintiff, or unless notice should be given by the defendants to the plaintiff that his said application had been refused by the

defendants, with a return to him of a part of said premium, proportionate to the unexpired portion of the said period of three months. And the plaintiff further avers that the defendants thereupon became and were liable, in the event of loss or damage by fire to the said stock of wool so insured as aforesaid during said period of three months, to pay and make good to the plaintiff the amount of such loss or damage, not exceeding the said sum of \$2,000. And the plaintiff avers, that from the said 15th of June, 1877, continuously until the happening of the loss hereinafter mentioned, he was interested and had an insurable interest in the said stock of wool to the said amount of the \$2,000, and while the said receipt or note and insurance thereby effected were in full force and effect as aforesaid, the said stock of wool so insured as aforesaid was burnt, damaged, and destroyed by fire, whereby the plaintiff suffered and sustained loss and damage on the same to the said amount of \$2,000 ; and the defendants did not at any time before or since the happening of such loss and damage deliver to the plaintiff a policy of insurance of defendants upon the said stock of wool, for the amount, upon the terms, and for the period specified by said receipt or note, nor was notice given to the plaintiff by the defendants that his said application had been refused by them, with a return to him of a part of said premium proportioned to the unexpired portion of the said period of three months ; and all the conditions were fulfilled, &c., necessary to entitle the plaintiff to maintain his action, yet the defendants have not paid the amount of the loss and damage aforesaid to the said amount of \$2,000, and the same remains wholly unpaid and unsatisfied.

Third count: This was also on equitable grounds, and was precisely similar to the second count, except that the application was alleged to have been made on 29th July, 1877, for one month, for which an interim receipt of that date for thirty days was alleged to have been given.

The common counts were added.

Pleas: To the first count: 1. *Non est factum*.

To the first, second, and third counts. 2. That the plaintiff was not interested in the property in the first, second, and third counts mentioned to the full amount insured therein, or to any amount.

3. Traversing the loss by fire.

To the first count: 4. Omission to give notice of a prior insurance in the Canada Fire and Marine Insurance Company, and to have the same endorsed on the defendants' policy as required by one of the conditions of the policy. 5. Breach of one of said conditions, in keeping more than twenty-five pounds of gunpowder on the insured premises. 6. Breach of one of said conditions in keeping more than five gallons of coal oil on the insured premises. 7. Failure to deliver, as required by one of said conditions, within fourteen days after the loss, as particular an account as was practicable of the property destroyed, and of the value thereof, immediately before the happening of the fire, and of the plaintiff's sole interest therein.

8. Alleging that the plaintiff, in further violation of the condition set out in the last plea, was guilty of fraud and false statement in relation to the statement of claim which he furnished to the defendants, in stating the value of the wool alleged to have been lost at \$4117.87, when it was not nearly equal to that amount, as the plaintiff well knew, and in stating that no other person had an interest therein, whereas the whole of said wool, or part thereof, belonged to or was hypothecated to the Merchants' Bank, as the plaintiff well knew.

To the first, second, and third counts: 9. Fraudulent over-valuation.

To the second and third counts: 10. That the said A. M. Kirkland was not the duly authorized agent of the defendants for the purpose therein alleged; and that the said interim protection notes, therein respectively set forth, were not the defendants' interim protection notes.

11, 12, and 13. Setting up that the interim receipts were contracts by defendants to deliver policies to the

plaintiff, and that the insurances thereby effected were on certain terms and subject to certain conditions which were to be endorsed upon and form part of the said policies; and alleging respectively the breaches of the conditions set out in the 4th, 5th, and 6th pleas.

14. Setting up one of said conditions, that any fraud or false statement in a statutory declaration in relation to any of the particulars of loss shall vitiate the claim, and alleging that in a statutory declaration in relation to the particulars of his alleged loss, the plaintiff falsely and fraudulently stated that the value of the wool lost was \$4117.87, whereas the said loss was not nearly equal to that amount, as the plaintiff well knew, and that no other person had an interest therein, whereas the whole or part of the said wool belonged to or was hypothecated to the Merchants' Bank, as the plaintiff well knew.

15. That contrary to said conditions, the plaintiff omitted to communicate and state to the defendants, in his application for the several insurances in the said counts mentioned, that large quantities of coal oil and gunpowder were stored and kept in the building containing the subject assured, and in buildings of the plaintiff immediately adjoining the same, which facts were material to be made known to the defendants, &c.

To third count: 16. Setting up one of the conditions of the policy, that any person entitled to make or claim under the policy, is to observe the following directions: (a) He is forthwith, after the loss, to give notice in writing to the company. (b) He is to deliver, as soon after as practicable, as particular account of the loss as the nature of the case permits. (c) He is also to furnish therewith a statutory declaration declaring: 1. That the said account is just and true. 2. When and how the fire originated so far as the declarant knows or believes. 3. That the fire was not caused through his wilful act or neglect, procurement means, contrivance; and 4. The amount of other insurances. And alleging that the plaintiff had not given to the defendants notice of his said loss, nor as particular account

thereof, &c.; nor any statutory declaration containing the required particulars.

To second count: 17. Alleging further neglect to notify and furnish the defendants, as required by the condition in the last plea mentioned, with particular account of loss as soon as practicable, &c.

To the first count: 18. Failure to mention to defendants particular circumstances of risk, namely the contiguity of a store of the plaintiff containing large quantities of coal oil and gunpowder, and also of coal oil and gunpowder being kept on the premises containing said wool.

To the common counts: Never indebted.

Issue.

The cause was tried before Patterson, J.A., and a jury, at Guelph, at the Spring Assizes of 1878.

The plaintiff kept a hardware store in Orangeville, and was also a large buyer of wool.

The defendants' head office for Canada was in Montreal, and Mr. Kirkland was their local agent at Orangeville. He was also agent there for the Merchants' Bank. The plaintiff was a customer of the bank; discounted paper with them for wool purchases, on the security of warehouse receipts attached to the notes, and effected insurance thereon with Kirkland as further security.

The latter said that he held the plaintiff's insurance papers as his banker. When the plaintiff required insurance, Kirkland either received the premium in money or charged the plaintiff therewith in his bank account. At the end of each month he remitted the premiums to the head office.

The fire took place on the 3rd of August.

It appeared in evidence that the plaintiff put in an application for each insurance, and was charged by the agent with the amount of the premiums. But the agent stated that he had not time to fill up the printed forms of receipt when the applications were received; and he gave no receipts till some time after the fire had occurred, when he drew them up, dated as of the days on which the applica-

tions were received, but as to the exact time at which this was done he was not very clear. He said, "I suppose it was some time in August. I have no idea what time." But he said Mr. Mudge, one of the general agents of the company, was up in Orangeville then. He said he thought he told Mudge he had not given the receipts, but he did not ask Mudge if he might give them. He told him the premiums had been paid. Mudge asked him for his receipt book, and he gave it to him. He said he thought this was in September.

Mudge in his evidence fixed the date of his being in Orangeville as the 25th of September.

The receipt given by Kirkland, (as may be inferred about 25th September), for the application of the 15th of June, was as set out in the second count of the declaration.

A similar receipt was written and given at the same time for the proposed insurance of the 29th of July, for \$1000.

The agent said he wrote them out from an old printed form. The defendants gave no instructions, (he said) to give receipts on their printed forms. They supply forms. These were the only receipts that were written; he had not time to fill up the printed forms when he took the applications.

This receipt book was produced with the interim receipts printed, with a border or counterfoil in which the particulars were noted; then the receipt when filled in was torn off (like a cheque) and given to the party.

He said he gave this book to Mr. Mudge: that he took a note of the counterfoil, and in that way got the particulars for the receipts.

In the book were the counterfoils, but the printed forms that at one time were attached were torn off. There were in all thirty-five counterfoil entries of insurance.

Kirkland said, "I had not time to fill up the printed forms when I took the application. I destroyed them before the fire."

He said that when he drew out the receipts he had not ceased to be agent for the defendants: that he never

got notice to cease to be agent. He was not specially examined on this point, and no question was put to Mudge thereon. Kirkland did not, however, afterwards do any insurance business for the defendants; and it was clear that he did not consult his superior officer Mudge, or inform him as to giving these receipts, although he had just given him the book, from the counterfoils of which the printed forms had been torn off.

Both the applications were forwarded by the agent to the head office. That of the 15th of June was received there on the 20th: that of 29th July, was received on the 6th August, in Montreal, after the fire.

On the same day the agent's account was received, professing to be a monthly account for the month of July. It contained the entry of 15th June, Application No. 26, for \$2000, with premium \$20. The last entry was of July 18th. It did not contain the transactions of July 29th.

Kirkland said that he sent all premiums received by him to the head office; but as to the premium on 29th July, he could not state when he sent it.

At the close of the plaintiff's case, the defendants contended that the plaintiff must fail on the counts on the policy, on the ground of there being a further insurance on the same property in the Canada Fire and Marine Insurance Company, and the Western Assurance Company: that there could be no recovery on the receipts of the 15th June, and 29th July, as they were not given by the agent till after the fire.

The plaintiff contended that these alleged further assurances were not on the property now in question, which did not exist at that date, and that this defence could only arise under the conditions of the policy, and under *Ulrich v. National Ins. Co.*, 42 U. C. R. 141, and *Frey v. Mutual Ins. Co. of Wellington*, 43 U. C. R. 102, the policy must be deemed to be without conditions: that as to the receipts, there was a contract made by the agent; and that they were not subject to conditions, as the usual conditions of the policy must be read as including those only which under the statute are available.

The learned Judge was of opinion that the insurances under the receipts could not be supported: that in conformity with the decisions referred to, he must hold that the policy had no conditions: that he was inclined also to hold that the alleged further insurances did not cover the wool in question, but that it was unnecessary to decide it: that the questions of fact would have to be disposed of by the jury, the parties having leave to move.

The case then proceeded, and the defence was gone into. The defendants further contended that misrepresentation was shewn in the allegation in the proofs, that the property belonged exclusively to the plaintiff, and that no person had an interest therein, because it belonged to the Merchants' Bank under the warehouse receipts.

For the plaintiff it was contended, 1. That the plea setting up this defence was under an alleged condition, and that, as before stated, there were no conditions. 2. That the statement meant that no one had a joint interest with the plaintiff, and the defendants knew and stated on the face of their policy that the Merchants' Bank had an interest; also, that the statement must be fraudulent; and in fact the receipts passed no property, as the plaintiff was not a warehouseman.

The plaintiff asked the learned Judge to leave it to the jury to say what was the intention in effecting the policies in the Canada Fire and Marine Insurance Company and the Western Assurance Company, was it to cover the wool to be bought in the coming wool season, or only such as might happen to be on hand when the policies were effected.

The learned Judge refused to leave this, as he thought it a question of construction, but that before disposing of any question of law the Court might draw any inference of fact from the documents or evidence that may be necessary.

The learned Judge left the following questions to the jury, namely:

Taking the value of the wool to have been the cost price

of it, what was the amount of the plaintiff's loss upon it by reason of the fire? Answer. \$3,000, after deducting salvage.

Was there at the time of the fire more than twenty-five pounds of gunpowder stored or kept in the building containing the wool? Ans. No.

Was there coal oil exceeding five gallons kept on the premises? Ans. No.

Was the alleged misrepresentation fraudulent? Ans. No.

Was the application of the 15th of June made by the plaintiff as an application for one month or for three? Ans. Three months.

The learned Judge entered a verdict for the plaintiff for \$1,030, with leave to the plaintiff to move to increase it by adding the amounts under the other counts; and he entered a nonsuit on the other counts,

In this term, May 22, 1878, *Ferguson*, Q. C., for the plaintiff, obtained a rule to shew cause why the nonsuit entered as to the second and third counts should not be set aside, pursuant to leave reserved, and to the Administration of Justice and Law Reform Acts, and a verdict thereon entered for the plaintiff, and the damages assessed by the jury in respect thereof distributed thereon respectively, on the grounds that the plaintiff succeeded in establishing, and the evidence shewed, a good cause of action against the defendants on each of the said counts.

2. That the plaintiff shewed, and the evidence disclosed good and valid parol contracts of insurance upon which the plaintiff paid the premiums, and no default on his part was shewn or disclosed, and the plaintiff was therefore entitled to recover thereon.

3. That the premium receipts or protection notes, although not in fact signed and issued by the agent of the defendants until after the happening of the loss, were nevertheless in equity good and valid contracts of insurance, and should be deemed to be the same as if they had been signed

and issued by the agent at the time of the making of the applications by the plaintiff; and the premiums having been paid upon them in good faith, and received and retained by the defendants without objection until after the happening of the loss, and still retained by the defendants, and no default of the plaintiff disclosed, the defendants should be held liable, and the plaintiff entitled to recover upon the said counts.

4. That the contracts of insurance having been expressed to be made subject to all the usual terms and conditions of the defendants, and it being shewn by the evidence that the defendants had not adopted what are known as the statutory conditions, or ever issued a policy in compliance with the Act 39 Vic. ch. 24, O., and the said insurances having been effected and in force in Ontario after the passing of the said Act in respect of property in Ontario, the same are to be deemed to be subject to no conditions; and even if such insurances are to be considered as subject to the conditions contended for by the defendants, the evidence did not disclose a violation of any of such conditions, nor did the defendants succeed in proving their pleas to either of the said counts setting up such conditions, or any of them; and the finding of the jury was against the defendants, because the issues raised in this respect upon the first count were in effect identical with and inseparable from those raised upon the said second and third counts; and also to shew cause why the damages should not be proportionately increased according to the actual value of the property destroyed by the fire as shewn by the price that was offered for it, as compared with the price at which the jury were directed to assess and did assess the damages, and the verdict entered accordingly.

In the same term, May 23, 1878, *M. C. Cameron*, Q. C., for the defendants, obtained a rule to shew cause why the verdict for the plaintiff on the first count should not be set aside and a nonsuit entered, pursuant to leave reserved, or for a new trial, on the ground that the said verdict was contrary to law and evidence, there having been a further

insurance on the wool insured not notified to defendants, also powder kept on the insured premises to a greater amount than allowed by the policy; and the plaintiff was not the owner of the wool at the time of insurance or at any time afterwards, the same having been transferred by warehouse receipts under the Act respecting Banks and Banking to the Merchants' Bank of Canada; and this suit should have been brought in the name of the said bank, if at all; and by reason of the plaintiff not having given the proofs of his loss within fourteen days of the loss; and by reason of fraud and misrepresentation as to the amount of loss, and as to the value of the property at the time of application for insurance and afterwards; and by the plaintiff representing that he was the owner of the wool, and that no one else was interested therein.

In this term, May 31, 1878, *M. C. Cameron*, Q. C., and *J. T. Small*, shewed cause to the plaintiff's rule, and supported the defendants' rule. The defendants can only be bound either by proper interim receipts, or by a policy. Here the receipts were not made until after the fire. The plaintiff contends that there was a good verbal contract at the time the applications were made, and which could be enforced in equity, and that the receipts were subsequently drawn up in accordance with such contract. This cannot prevail. There is no authority to an agent to enter into verbal contracts. The applications, moreover, are for insurances on the usual terms and conditions of the company, and by the terms of the policy it is expressly provided that no receipt or acknowledgment of insurance shall be binding unless made by and on one of the printed forms used by the company, and signed by their authorized agent. In the face of this express direction, it cannot be held that a mere parol contract is sufficient: *Jones v. Provincial Ins. Co.*, 16 U. C. R. 477; *Kelly v. Isolated Risk, &c., Ins. Co.*, 26 C. P. 299; *Penley v. Beacon Assurance Co.*, 7 Grant 130; *Montreal Ins. Co. v. McGillivray*, 13 Moore P. C. 87; *Davis v. Canada Farmers' Mutual Ins. Co.*, 39 U. C. R. 452; *Calvin v. Provincial Ins. Co.*, 20 C. P. 21. Also, when Kirkland filled in

the receipt he had ceased to be the plaintiff's agent. The evidence also shews that the application of June 15th, was only for one month, and not for three months. The plaintiff therefore fails on the second and third counts. There can be no recovery on any of the counts. There was misrepresentation as to the further assurance, and it clearly covered the insured property. The attempted distinction between the wool house and the other storehouse, was a mere fiction of the plaintiff. There was also misrepresentation as to the ownership of the wool, because under the warehouse receipts the property was in the Merchants' Bank, for under 31 Vic. ch. 11, sec. 7, D., the endorsement of the warehouse receipts to the bank had the effect of transferring to the bank all the right and title of the plaintiff in the property. The case of *McBride v. Gore District Mutual Ins. Co.*, 30 U. C. R. 451, is express that this constituted the bank the owner of the wool. The action should therefore have been brought by the bank, or the declaration should have alleged that the plaintiff was suing merely as a trustee: *Cole v. Bank of Montreal*, 39 U. C. R. 54; *Dear v. Western Assurance Co.*, 41 U. C. R. 553. There was also misrepresentation as to the quantity of gunpowder, and clearly fraudulent misrepresentation as to the proofs. The plaintiff contends that under *Ulrich v. National Ins. Co.*, 42 U. C. R. 141, and *Frey v. Mutual Ins. Co. of Wellington*, 43 U. C. R. 102, the policies must be assumed to be without conditions. The conditions are in effect the statutory conditions, and this is all that is required. The decisions referred to cannot apply to the policies to be issued under the interim receipts, as it must be assumed that the policies when issued would have conditions in accordance with the statute.

Ferguson, Q. C., contra. The authorities shew that an agent who has power to enter into contracts of insurance by interim receipts, may enter into a verbal contract, and subsequently issue the receipts. Here the money was paid and the applications made at the proper time, and the fact of the receipts not being then filled in cannot be attributed

to any negligence on the plaintiff's part. The reason that the plaintiff did not require the receipts to be issued at the time the applications were made was because the defendants' agent was also the agent of the bank, who were to hold the insurances as collateral security for advances made. The interim receipts, though not signed till after the fire, constituted good and valid insurances in equity, and must be deemed as if made at the time of the applications: *Insurance Co. v. Colt*, 20 Wallace 560; *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 Howard 318; *Kelly v. Isolated Risk, &c., Ins. Co.*, 26 C. P. 299; *Sansum's Ins. Dig.*, 886; *Security Fire Ins. Co. v. Kentucky*, 7 Bush. 81; *May on Insurance*, 13-33; *Collett v. Morrison*, 9 Hare 162; *Kelly v. Commonwealth Ins. Co. of Pennsylvania*, 10 Bos. 83; *Angell v. Hartford Ins. Co.*, 59 N. Y. 171; *Fish v. Cottenet*, 44 N. Y. 538; *Perkins v. Washington Ins. Co.*, 4 Cowen 645. As to the interim receipt of June 15th only being for one month, it was expressly left to the jury, and they have found that it was for three months. It is contended that even if these are valid contracts of insurances, they as well as the policy in the first count are void for breach of conditions. The cases of *Ulrich v. National Ins. Co.*, 42 U. C. R. 141, and *Frey v. Mutual Ins. Co. of Wellington*, 43 U. C. R. 102, are clear, that the conditions of the policy not being in accordance with the statute, the policy must be deemed to be without conditions; and the same argument applies to the interim receipts, as it must be assumed that the policies to be issued thereunder must be the defendants' usual policy, with the conditions endorsed thereon. There has, however, been no breach of the conditions. The questions as to the quantity of gunpowder and coal oil, and fraudulent misrepresentation in the proofs, were expressly left to the jury and were found by them in the plaintiff's favour. As to the insurance in the Canada Fire and Marine Insurance Company, that was on different property. The evidence shews that it was not upon the wool insured by the defendants, namely, the wool

purchased in the wool season, but on small quantities purchased out of the wool season which were stored in the general storehouse, apart from the wool house where the wool purchased in the wool season was kept, and which was not in existence when the policy objected to was renewed. As to the ownership, there is no question but that the plaintiff had an insurable interest. The endorsement of the warehouse receipts must be looked upon merely as a pledge or mortgage, and the cases are clear that a mortgagor has an insurable interest. The property, however, did not pass to the bank, as the plaintiff had no power to give warehouse receipts. Then as to the damages, the plaintiff is entitled to recover as damages the actual value of the goods at the time of the fire, or what they could be replaced for: *Mayne on Damages*, 3rd ed., 302.

September 5, 1878. HAGARTY, C. J.—As to the second and third counts on equitable grounds, based on the interim receipts, the learned Judge nonsuited the plaintiff, holding in effect that there was no binding insurance.

This raises a very serious question.

The dealing in substance seems to be this:

The plaintiff goes to the local agent, signs an application requesting insurance for so much, on property described, on the usual terms and conditions of the company. The local agent, who is also acting as and for the plaintiff's bankers, agrees on the rate, and charges the plaintiff the amount thereof in his bank account (or receives it in cash), but gives no receipt, and signs no contract whatever professing to bind the company. He informs his distant principals of his having made insurance, but says nothing as to how he has done it. After the loss he remits the amount of premium to the company. When the loss occurred on the 3rd of August, neither the company nor their agent had signed any contract of insurance.

We may assume that it was, as the agent states, merely an omission to sign the interim receipts, and that both parties regarded it as if they had been signed, or rather

that the dealing took place on the basis and terms of such receipts as if signed.

I think the liability must be tested or considered as it stood at the time of the fire. Was there an equity then existing to compel the defendants to execute a binding contract of insurance, or were they then bound by what had taken place with their local agent? I do not see how the fact of this agent, some time late in September, both after the loss and after the lapse of the thirty days within which policies would issue under the words of the receipts, executing interim receipts as of the dates when the premiums were received, can help the plaintiff.

Had the local agent power to bind this company by the mere act of receiving the applications and the premiums, and verbally telling the plaintiff that he was insured?

Little, if any, evidence was taken at the trial, as to the extent of the agent's authority. The application is for insurance on the usual terms and conditions of the company. The ordinary policy of the defendants was produced and proved.

Condition 3 declares "No insurance proposed to this company is to be considered in force until the payment due thereon be actually made * * The formal printed interim receipts issued from the office, and witnessed by one of the clerks or agents of the company, will alone be evidence of such payments. No receipt or acknowledgment of insurance, either new or renewal, shall be binding, unless made by and on the printed forms used by this company, and signed by the authorized agent."

We are told that we should regard this insurance as made without any conditions.

We are now discussing the extent of this agent's authority to bind his principals, and we think we can certainly look at this public declaration of the defendants as to how they as a corporation propose to deal and contract with the public.

Mr. Kirkland was their local agent at Orangeville, and it is clear, we think, that the ordinary course of dealing was to insure always by these interim receipts, and that

when communicated to the head office the company could accept or decline.

He was furnished with a book of printed forms with counterfoils and receipts like an ordinary cheque book. In this he has in all thirty-five counterfoil entries of insurances for the defendants. All the forms of receipts are torn off therefrom.

I do not think that the law would infer any power in the local agent of a corporation to bind them by entering into a mere verbal contract, when such agent had a clear course laid down for his guidance as to entering into a temporary and carefully guarded written contract.

If he has the power here asked, it is not easy to see why he may not verbally enter into any arrangement he may please, whether it may vary from the terms set out in the printed forms or not.

Although there be no statute requiring a contract of insurance (as such) to be in writing, we may well pause before holding that a corporation entrusting distant local agents with the power of effecting a temporary insurance in a specified written form, can be bound by the verbal contract of such agent, unless on some clear evidence of ratification, and a course of action sufficient to create an equitable estoppel on their disputing the contract.

Our Legislature among its "Statutory conditions," which are to be in every policy "as against the insurers," condition 21, says: "Any officer or agent of the company, who assumes on behalf of the company to enter into any *written* agreement relating to any matter connected with the insurance, shall be deemed *primâ facie* to be the agent of the company for the purpose." (a)

In both the counts the claim is rested distinctly on the contract supposed to be entered into on these interim receipts. They aver that Kirkland was the duly authorized agent of the defendants to receive premiums, and to issue premium and interim receipts and protection notes of the defendants in the terms thereafter set forth; and that

(a) R. S. O. ch. 162.

the plaintiff on the date of the receipt paid the premium, and Kirkland so being authorized to bind the defendants, and intending to bind them thereby, granted to the plaintiff a note in writing—setting it out verbatim. Then it is averred that the said receipt became and was binding upon the defendants in law and equity as an insurance, &c.; and while the said receipt or note, and the insurance thereby effected, were in full force and effect, the stock was burned and destroyed, &c.

The tenth plea states that Kirkland was not the duly authorized agent of the defendants for the purpose therein alleged; and that the said interim protection notes therein set forth, are not the defendants' interim protection notes.

It seems clear to us that, on the case presented by the second and third counts, the plaintiff wholly failed.

We cannot see how he proves his case of an insurance evidenced by interim protection notes, never in fact given to him or made as alleged by the agent on the making of the contract sought to be enforced, and which he avers to have been in force when the loss happened.

He does not attempt on this record to make out a case against the defendants at law or in equity, except on the statements in these counts of interim receipts given in due course by an authorized agent of the defendants, and binding on them when his claim for indemnity accrued on the happening of the fire. As already suggested, if the defendants were not bound by Kirkland's acts when the loss occurred, we do not understand how they can become bound by any act of his done long after the loss, and even after the expiration of the time when the temporary insurance would in due course be either declined, or perfected by a formal policy.

We are not called upon to discuss any of the matters suggested in argument as to the effect of the receipt of premiums by the defendants from their agent, &c. No such case appears upon the record or was sought to be placed there.

At present we do not see how any alteration of state-

ment could help the plaintiff, but our decision rests on the grounds above set forth, viz., the failure of the plaintiff to prove his case.

Mr. Ferguson in his excellent argument cited two decisions of the United States Supreme Court, which we have carefully examined.

The Commercial Mutual Ins. Co. v. The Union Mutual Ins. Co., 19 Howard 318, (1856). The head notes explain the point, "Where application for re-insurance was made on Saturday, upon certain terms, which were declined, and other terms demanded, and on Monday these last mentioned terms were accepted by the applicant, and assented to by the President," (at the company's head quarters) "but the policy was not made out, because Monday was a holiday, the agreement to issue the policy must be considered as legally binding. * * That although insurance companies can make valid policies only when attested by signatures of the president and secretary, yet they can make agreements to issue policies in a less formal mode. * * Where the power of the president to make contracts for insurance is not denied in the answer, or made a point in issue in the Court below, it is sufficient to bind the company if the other party shews that such has been the practice, and thereby an idea held out to the public that the president had such power."

The other case, *Insurance Co. v. Colt.*, 20 Wallace 560, was in 1874. There the head office was in Philadelphia, and a parol contract of insurance was made with their agents at Hartford, Conn., on the 26th August. It was agreed that a policy should be made out and that the agents should keep it in their possession for the plaintiff for his convenience. The property was destroyed by fire on the 20th September. After the loss, the agents at plaintiff's request filled out a blank policy, properly signed and countersigned.

The company had no knowledge of the negotiations or of the contract to insure till after the fire. They were held liable. The Court, at p. 567, pointed out the clear distinction

between what the charter of such companies requires as to executed contracts or policies, and "those initial or preliminary arrangements which necessarily precede the execution of the formal instrument. * * A contract to issue a policy as an executory agreement to insure might be binding without a written memorial of it; that no Statute of Frauds applies, and that the common law did not require writing. * * The agents were authorized to do after the fire that which they had previously stipulated to do on behalf of the company. The original neglect to fill up the blank policy at once constituted no valid ground for further delay. If the policy filled up at once would have bound the company, so must the policy subsequently filled up. The relations of the parties and the obligations of the company were not changed by the neglect of the agents. The filling up of the policy was a voluntary specific performance of the preliminary agreement."

All we can find in the case as to the extent of the agent's authority, is the statement that the charter authorized the president and directors to appoint officers and agents for conducting its business in other places than in Philadelphia.

I am not able to hold that the principles laid down in these cases are to decide this case in favour of the plaintiff. Here the question is one of authority: 1. Had the agent actually effected these insurances so as to bind his company, acting within the fair scope of his authority? 2. Had he the power, in September, to supply the omissions of his first dealings of June 15th and July 29th.

It seems to me that he had no authority to bind his principals except by fairly acting within his deputed powers.

He had not, as in the last case, blank policies duly signed left in his possession to use and fill up as he thought proper. Every application had to be submitted for approval to his principals, and, in my judgment, he had no power to bind them to any temporary protection except in the manner pointed out in their printed contracts, and by the forms with which he was specially furnished for that purpose.

There was no pretence of any known usage or practice to hold companies bound by a verbal promise or agreement of a local agent.

Few things are better understood by almost every person seeking insurance, than that some kind of written instrument or receipt is unvariably asked for or expected. Here the plaintiff left every thing in the management of the agent, who was also acting as his banker, and in effect, paying the premiums, and trusted to perfect the insurance.

We can have no desire whatever to narrow the necessary and proper powers of insurance agents.

We are not, however, prepared to hold that they can create a liability against a company for whom they are acting, except with the authority express or implied of the company. Certainly no express authority is here shewn, and on the evidence, and on all that is known of the usage and practice of insurance companies, we cannot see how any authority can be implied.

If this method of doing business be upheld, it must follow, that the payment of the premium, or its receipt in a letter asking for insurance, followed by a verbal assent that it was all right, or a note or telegram to that effect, creates a binding contract as against distant principals who had adopted a clearly defined method of creating a liability on their part by a written form.

Nor can I believe, that in September, when Mudge, the chief officer, was up investigating the matter, that Kirkland could, without his knowledge or assent, create or add to the liability of the company for the loss of August 3rd, by any writing executed by him dated back to the original dealing.

Neither the plaintiff nor Kirkland himself could, I think, fairly suppose that the latter was then entitled to act as the defendants' agent either in creating a fresh liability or making good, as far as he could, a former imperfect or inchoate liability. He had given his receipt book to Mudge, the printed forms were before that torn away from the counterfoils, and he then, without communication with his

principals represented by Mudge, draws up the alleged interim receipts.

In the view we take it is not necessary to notice the objection as to one of the applications being for one or for three months. The jury found this in the plaintiff's favour.

We have now to consider the defendants' motion against the verdict on the first count. The grounds are—law, and evidence; the existence of a further insurance not notified to defendants; powder kept on the premises to greater amount than allowed by the policy; that the plaintiff was not the owner of the wool, the same having been transferred by warehouse receipts to the Merchants' Bank, and that the suit should have been in their name; that the proofs were not given within fourteen days; that there was fraud and misrepresentation as to the amount of loss, and as to the value at the time of application, and in representing that no other except the plaintiff had an interest in the wool.

On the general merits of the claim, a perusal of the evidence induces us to agree with the report of the learned Judge, which is in favour of the plaintiff.

The defence as to the quantity of powder was disposed of by the jury; also that there was no fraudulent misrepresentation.

The questions really pressed in argument, and requiring our decisions are: 1. The non-communication of the insurance in the Canada Fire and Marine Insurance Company, set out in the fourth plea. An insurance in the Western Assurance Company was also spoken of, but it is not pleaded, and it had been cancelled before the loss. 2. The question of ownership.

Before discussing the question as to whether the statutable conditions are or are not to be considered as in the policy, we will examine the facts on these two defences. Taking the last first, we think we should examine the facts very strictly against such a defence, as the defendants through their agent had the fullest notice of the Bank's claim, and in the policy issued by them it is

declared that "Loss, if any, payable to Merchants' Bank of Canada"—a direct notice of the Bank having an interest. The plaintiff had undoubtedly an insurable interest, even if the wool were under warehouse receipt to the bank, and the issue (second plea) denying interest would be properly found for the plaintiff.

Mr. Ferguson urged at the trial that the property did not pass to the bank as the plaintiff was not a warehouseman. But there is no plea, beyond the general denial of interest, raising this question on the first count.

The fourteenth plea is only to the second and third counts, and avers fraudulent statement in the proofs of loss, that no other person had an interest in the wool, whereas it belonged or was hypothecated to the Merchants' Bank.

On this record therefore the defence is not pleaded to first count, the averment of interest being sufficiently proved on the traverse (second plea) "that the plaintiff was not interested in the property in the first, second, and third counts mentioned, to the full amount so insured thereon, or in any amount."

It remains to consider the objection as to the non-communication of the policy with the Canada Fire and Marine Assurance Company, under the fourth plea.

The policy was for twelve months from the 10th of November, 1875, to the same day 1876. It was for \$2000, \$1000 on building and \$1000 on stock of sheepskins, wool, hides, and stoves, contained in a frame storehouse building in rear of the previously described front building occupied as a hardware, stove, and tin store. This was renewed for another year on 10th November, 1876, with an amended description to read "\$1000 on stock, sheepskins, hides, furs, wool, rags, copper, feathers, stoves, ploughs, stove castings, and agricultural implements in frame storehouse in rear of hardware, tin, and stove store."

The policy with these defendants is from the 23rd of June to the 23rd of August, "on a stock of wool contained in a one-story frame building, &c., occupied as a storehouse, further described in the application.

It was contended for the plaintiff that the Canada Fire and Marine policy was not on the wool insured with defendants.

The wool buying season is from May in each year to July. All wool was kept in one storehouse, and no other property there except wool. At the time of the fire the plaintiff had in that place all the wool bought that season. None was sold. The plaintiff says he always sold the year's wool in one lot.

He says: "After the season I insured wool, hides, &c., in one house, the wool being small lots of pickings, &c. There was (he says) a wool house distinct from the storehouse * * The other storehouse was separate, not put up at same time, nor under the same roof. Each was 12 x 24. During the wool season I kept all the wool in one house, which contained nothing but wool, and insured it there. * * I kept rags, iron, pickings, sheepskins, &c., in a building adjoining the wool house. The wool pickings were kept towards the south part. * * I did not consider my insurance on storehouse and contents to include the wool house. * * The wool referred to in the Canada Fire and Marine policy was meant to be small lots coming in after the wool season was over, and after my wool policies were out."

A witness, *Noble*, says: "During the time which was not the wool season, the wool house was used for a storehouse for stoves, grindstones, &c."

Another witness, *Walker*, said the wool was kept in the building immediately in rear of the main building. The storehouse up stairs and down was packed full of wool.

Another witness, *Nieland*, said there was no stairway in the wool house, no opening from outside into the upper story. There was one from the other storehouse.

Again the plaintiff says: "On the 1st of February, I don't think I had any wool but pickings, and those would be in the back storehouse, if I had any." He says the diagrams did not shew correctly the true position of the premises.

The learned Judge on this point said: "I am inclined to

construe the policies in the Canada Fire and Marine and Western Assurance Companies as not covering the wool in question.

Mr. Ferguson asked it to be left to the jury what was the intention in effecting the policies of the Canada Fire and Marine and Western Assurance Companies. Was it to cover wool to be bought in the coming season—wool season—or only such as might happen to be on hand when the policies were effected.

The learned Judge said he declined to leave this question, as he thought it a question of construction, but that before disposing of any questions of law the Court might draw any inferences of fact from the documents or evidence that may be necessary.

The plaintiff had a verdict on the first count, and a nonsuit was entered on the other counts, with leave to move.

We find it impossible to understand from the evidence and diagrams the exact position of the back premises, or the existence or non-existence of any separate store distinct from the "wool house."

On the evidence we think we may assume that the two months' insurance here was on wool being bought in the wool season from May to July, and that none of the wool existing on the plaintiff's premises in that season was there when the Canada Fire and Marine policy was renewed for twelve months from the preceding November.

Reading the latter policy we should certainly come to the opinion that it was not designed as a protection to the plaintiff for wool to be purchased in the ensuing season.

A small insurance of \$1,000 on stock of "sheepskins, hides, furs, wool, rags, copper, feathers, stoves, ploughs, stove-castings, and agricultural implements," could hardly have been intended to protect the large quantities of wool possibly to be bought six months after. There is nothing on the face of the policy to shew an intention to cover property afterwards brought in. In condition five, it says, "Floating policies so called, are not authorized to be written by agents of this company."

Assuming that it is understood between a merchant insuring his stock and the underwriters, that goods brought in in ordinary course, replacing existing goods, are protected, it may be a very different question as to one of a large number of insured items being at a future period increased a thousand fold in value by the dealings of a short periodical buying season.

Wool or wool rags or pickings might exist in small quantities with many other goods in a country store, all covered by an annual insurance. Then for two months in the year very large quantities of wool are purchased, and special temporary insurances for short periods are effected thereon, and all so purchased is kept together.

I think, without violating any rule of law, we may venture to hold that on the evidence before us the wool insured with the defendants was not insured by the Canada Fire and Marine policy. So the learned Judge inclined to hold at the trial, and so we think we may now hold, and not be too astute to defeat this claim.

In addition to this it was strongly contended that the defence was not open, as the defendants' policy must be held to contain no conditions; and two decisions of the Court of Queen's Bench are referred to. *Ulrich v. National Ins Co.*, 42 U. C. R. 141, does not turn on this question, but my brother Wilson seems to consider such a policy to be without conditions. *Frey v. Mutual Ins. Co. of Wellington*, 43 U. C. R. 102, is distinctly in favour of that view.

This policy wholly ignores the Ontario Act, and does not profess to contain any "statutory conditions." The conditions contained in it we cannot uphold as "variations," as they do not follow the statutory directions calling attention thereto.

We must pause, however, before holding the policy to be without conditions of any kind.

Several of these statutory conditions are of importance to the assured, and we should have thought were intended to be always available in his interest as against the underwriters,

But our decision in favour of the plaintiff does not rest on the absence or presence of conditions. If he have to defend our decision in the Appellate Court he can urge this as an additional argument.

The result will be to discharge both rules.

GWYNNE, J.—I agree that the nonsuit upon the second and third counts and the verdict for the plaintiff on the first count should be upheld, for the reasons given by the Chief Justice; and as to the second count for this additional reason, that whatever may have been contemplated by the plaintiff or Mr. Kirkland, it is plain beyond all controversy that the application in the second count referred to, which the defendants received, was only for one month, and they accepted \$10, part of the \$20, subsequently transmitted, as the premium for that period, and were willing to assume, and did in fact assume, the liability for one month, for which period they never issue a policy. The words "*three months*" were never in the application at all. The word "*two*" is plainly enough written under "*one*" which latter is written in large letters, and the word *month*, in the singular, not months, in the plural. Moreover in the letter sent by Mr. Kirkland forwarding the application he says that the plaintiff expects to sell in a week or ten days—language which would scarcely have been used if there had been any intention to insure for three months. The application would seem to have been prepared, and the amount inserted, with a view to cover three months if insurance for such a length of time should be resolved upon; but that one month was the time finally resolved upon I do not think there can be any doubt. An application for one month was the only one the defendants received. They did not dispute their liability for one month.

GALT, J., concurred.

Rules discharged.

IN RE M'ARTHUR AND THE CORPORATION OF THE
TOWNSHIP OF SOUTHWOLD.

By-law—Closing up road—Ingress and egress—Compensation.

Under sec. 422 of 36 Vic. ch. 48, O., the owner of land abutting on a particular road has an interest therein as affording ingress and egress to his land over such road, and he cannot be deprived of that advantage against his will without compensation.

Where a by-law was passed by a township corporation for closing up a public road, whereby the plaintiff was excluded from ingress and egress to and from his land which abutted thereon, and did not provide any compensation to the plaintiff: *Held*, that the by-law was invalid, and must be quashed.

THIS was an application upon the part of the proprietor of the south half of lot No. 9 in the third concession of the township of Southwold, to quash six several by-laws passed by the municipal corporation of the said township, and numbered respectively 248, 251, 252, 253, 254, and 255, by the first of which the corporation had assumed to close a certain public road, extending from the concession line between the second and third concessions, and running from thence between lots Nos. 9 and 10 in the third concession, across the said third concession, to the concession line between the third and fourth concessions of the said township, and thence partly between lots Nos. 9 and 10 in the fourth concession, and partly across the north half of said lot No. 9 in the said fourth concession, to the line between lots Nos. 8 and 9 in the said fourth concession, and thence between the said last mentioned lots to the concession line between the 4th and 5th concession of the said township of Southwold; and by the others of which by-laws the municipality have assumed to authorize the sale of portions of the road so closed by by-law No. 248 to divers persons.

The Court directed notice of the application to be served upon the purchasers under the latter by-laws, which was accordingly done.

The application was supported by affidavits, which shewed

that the property of the applicant abutted upon a portion of the road so assumed to be closed, and that divers other persons were proprietors of land abutting upon other parts of the said road ; and that the by-law for closing the same was passed against the will of such several proprietors ; and without providing any compensation for them, or any of them.

The road in question appeared to have been established by by-law of the Municipal Council of the township as far back as 1851, and had ever since been travelled. And by the affidavits filed, and which were very numerous, it appeared to be very clearly established that the applicant, McArthur, had a very material interest in that portion at least of the road which crossed the third concession as a means of ingress and egress to and from his land over the said road.

It also appeared that other persons, who had not been compensated in any manner, and who were supporting this application, were interested in like manner in other parts of the road directed by the by-law 248 to be closed.

In this term, May 31, 1878, *Street* (of London) shewed cause for the purchasers under the by-laws. The provisions of the Act 36 Vic. ch. 48, sec. 422, have been complied with. The plaintiff has been fully compensated by the increase of the value of his land, and another road has been provided. It is not essential that the by-law to close up the road should itself provide compensation, but it may be provided by a subsequent by-law. Until after the passing of the by-law to close up the road it cannot be ascertained whether or not the applicant's lands have been injuriously affected. When it is so made to appear the compensation may be acquired under the arbitration clauses of the Act. In any event before he can move to quash he must shew that he has applied for and been refused compensation. The by-law is valid on its face, and the Court should not interfere with it: *Moore and Corporation of Esquesing*, 21 C. P. 277. The case of *Thurston and Corporation of Verulam*, 25 C. P. 593,

is express that the absence of compensation in the by-law is no ground for setting aside the by-law. The evidence shews that the plaintiff assented to the closing up of the road, and he is estopped under the circumstances from setting up the invalidity of the by-law: *Kerr on Frauds*, 82.

Hodgins, Q. C., contra. The applicant's affidavits negative any assent on his part to the closing up of the road, and rebut any circumstances from which any estoppel could arise. The cases are express, that the by-law closing up a road must provide the compensation; and it is a condition precedent to the passing of the by-law: *Falle and Corporation of Tilsonburg*, 23 C. P. 167. *Thurston and Corporation of Verulam*, 25 C. P. 593, is merely a decision of a single Judge. The portion of the road there closed was a *cul de sac*, and compensation was in fact provided by a resolution of the Council. In *Annis and Corporation of Mariposa*, 25 C. P. 180, in the same volume of the reports, it was held that a by-law omitting to provide compensation was invalid, and it was quashed. This was a decision of the full Court in term, and if the Court should think there is a conflict of authority, then the decision of the full Court must govern. *Mayor, &c., of Montreal v. Drummond*, L. R. 1 App. 384, a decision of the Privy Council, affirms the applicant's contention. There is nothing in the evidence to shew that the applicant's land has been increased in value. Even if compensation may be provided by a subsequent by-law no such by-law has been passed.

September 5, 1878. GWYNNE, J., delivered the judgment of the Court.

By the Municipal Institutions Act of 1866, 29 & 30 Vic. ch. 51, sec. 320, it was enacted that "No council shall close up any public road or highway, whether an original allowance, or a road opened by the Quarter Sessions, or any municipal council, or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his lands or place of residence *over such*

road, but all such roads shall remain open for the use of the person who requires the same."

The 320th section of the Act of 1866, was amended by the Municipal Institutions Act of 1873, 36 Vic. ch. 48, O., the 422nd section of which, in lieu of the 320th sec. of the Act of 1866, enacted that, "No council shall close up any public road or highway," &c., following the language of the 320th section of the Act of 1866 to the words, "to and from his lands or place of residence over such road"; and adding, "unless the council, in addition to compensation, shall also provide for the use of such person some other convenient road or way of access to his said lands or residence." (a)

Why a person, besides receiving full compensation for all injury sustained by the closing of a road in the keeping of which open he was interested, should also have another convenient road provided for him in lieu of the road closed, it is difficult to understand; but it clearly was the intention of the Legislature that the parties coming within the description of persons excluded from ingress and egress to and from their land or place of residence *over the road* intended to be closed should be compensated for the loss sustained by them in being deprived of such ingress and egress.

The municipal council does not appear in support of these by-laws, for the reason, as would seem, that the present councillors are of opinion that the applicant does sustain material damage by the closing of the road; but the persons who are the moving parties to getting the road closed, and who do appear in support of the by-laws, contend that the opening of roads between lots 6 and 7, and also between lots 12 and 13 in the third and fourth concessions of the township, afford ample compensation to the owners of the lands abutting on the road directed to be closed for the closing of that road.

(a) *Yeomans and Corporation of Wellington*, recently decided in the Queen's Bench, by Gwynne, J., in single Court, and not yet reported, seems to be authority to shew that McArthur, the applicant, here would, upon the strength of that case, and the authorities therein referred to, be entitled to compensation under the words "injuriously affected," in sec. 373 of 36 Vic. ch. 48, as well as under above sec. 320.

I must say I wholly fail to see how a road between lots 6 and 7, or between lots 12 or 13, in any concession, can afford any such convenience to the owner of lot 9 or 10 in the same concession as was afforded to him by a road between lots 9 and 10 and so abutting on his land, or could afford to the proprietor of lots 9 or 10 any compensation for the deprivation of ingress and egress to and from his land over a road which abutted on his land, but is now closed for ever if these by-laws can be upheld.

I think it a safe rule to lay down, that within the provisions of the section in question the owner of land abutting upon a particular road has such an interest in *that* road, as affording the peculiar facilities of ingress and egress to his land over a road abutting thereon, that he can never be deprived of that advantage against his will without compensation.

The by-laws must therefore be set aside at the instance of Donald McArthur as injurious to him, although it might be that, if the by-law had provided only for the closing of that part of the road which crosses the fourth concession he should not have been the applicant.

Had that been the nature of the by-law, there appear to have been other persons who are supporting this application who could have been applicants.

As, however, the by-law professes to authorize the closing of the whole road, and as a person interested in opposing that by-law as to a material part of the road is the applicant, the proper rule will be to set aside all the by-laws, those from 251 to 255 having nothing to support them, by-law No. 248 being quashed.

We must order the by-laws to be quashed, with costs to be paid by the municipality to the applicant.

Rule absolute (a).

(a) This case has since been reversed in the Court of Appeal.

JOHN BELL WRIGHT V. THE SUN MUTUAL LIFE INSURANCE COMPANY—REBECCA ANN WRIGHT V. THE SUN MUTUAL LIFE INSURANCE COMPANY—ARTHUR W. WRIGHT V. THE SUN MUTUAL LIFE INSURANCE COMPANY—JULIA E. WRIGHT V. THE LONDON LIFE INSURANCE COMPANY.

Policy of insurance—Omission to seal—Equitable relief—Reformation—Estoppel—Suicide—Exposure to obvious danger—Cause of accident—Evidence.

The Acts of incorporation of the Sun Mutual and London Insurance Companies, required insurance contracts to be under seal and signed and countersigned as by the Acts directed. The policies in these cases were not under seal, but were signed and countersigned as required, and on the printed forms of policies issued by these companies for some years previously. The attestation clause of the Sun Company's policy acknowledged it to be under seal, while in the London Company it merely professed to be signed, &c.

Held, that under the circumstances, more fully set out in the case the omission to affix seals must be deemed to be through mutual mistake; and that the plaintiffs were entitled to equitable relief, either by a reformation of the policies by the addition of seals, or by debarring the defendants from setting up such defence. An equitable replication setting up the facts, was therefore allowed to be added, and a new trial upon it was refused.

In these cases, which were on accident policies, the deceased was found dead in a cattle-guard on a railway, having been run over by a passing train. The cattle-guard was at the side of a street and near the end of the railway station platform, which extended to and adjoined the street. There was no express evidence as to how deceased got into the cattle guard. The defendants set up that, contrary to the terms of the policies, the death was occasioned by suicide or exposure to obvious and unnecessary danger, by the deceased attempting to cross over the street by walking on the track and then falling into the cattle guard.

The jury both at this and a former trial having found against the defence of suicide, the Court, not being dissatisfied with the finding, refused to set aside the verdict, though the circumstances, stated in the report, were very peculiar and tended naturally to excite suspicion.

The proof of such a defence rests upon the defendants, and the evidence of it should be clear and convincing.

Held, also, that there was no evidence of any such exposure, for that it was equally consistent with the evidence that the deceased accidentally fell into the cattle guard from the platform while walking along the platform; and, at all events, that the using of a track to cross a street was not the mode of walking thereon, against which prohibitions are levelled.

The policy also provided that the insurance was not to extend to mysterious disappearances, nor to any case of death, the nature, cause, or manner of which was unknown, or incapable of direct and positive proof.

Held, that this did not apply to cases where, as here, the immediate cause of death was indisputable, and evidenced by outward violence, but, as its context shewed, to mysterious disappearances, &c.

THESE cases were tried before Armour, J., and a jury, at Sandwich, at the Spring Assizes of 1878.

The first of the four was fully tried; and the verdicts in the other three cases appeared to have followed the result of the first by arrangement.

As to the first case: The declaration was on an accident policy, dated the 18th of September, 1875, by which, in consideration of \$6, the defendants insured John Wright, father of the plaintiff, in \$1,000, for twelve months, ending on the 16th of July, 1876, to be paid to the plaintiff: averring death from outward injury on 7th of December, 1875.

Pleas. 1. *Non est factum*.

2. Denial of the injury.

3. Death by suicide.

4. Death caused by exposure to unnecessary danger by walking along the track of a railway, &c., by means whereof the deceased was run over.

5. That death happened while the deceased was walking along the track, in violation of the railway rules.

6. That death as aforesaid happened while walking on the track in contravention of the laws of Michigan.

7. That the deceased did not use due diligence for his personal safety, &c., but was killed while endeavouring to pass over a cattle-guard on the track, and fell therein.

There was an added plea as to the age of the insured, on which nothing turned.

Issue.

There were the same pleas in each of the three first suits.

In the fourth, against the London Life Insurance Company, the pleas were substantially the same, with the addition of one or two others, on which no special questions appeared to have arisen.

The traverse was, instead of *non est factum*, that the defendants did not insure or promise.

The policy to the first named plaintiff alleged that the Sun Mutual Life Insurance Company, in consideration of

the representations made in the application for the insurance, dated 16th July, 1875, and of the sum of \$6, &c., did thereby insure the deceased in the sum of one thousand dollars, for the term of twelve months, &c. ; the said sum insured to be paid to his son John B. Wright, or his legal representatives, after sufficient proof that the insured, at any time within the continuance of the policy, should have sustained bodily injuries effected through external, violent, and accidental means, within the intent and meaning of the contract, and of the conditions thereunto annexed, and such injuries done should have occasioned death, &c., "Provided always that this policy is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained and referred to. * * Provided always that this insurance shall not extend to any bodily injury of which there shall be no external or visible sign, * * and no claim shall be made under this policy when the death may have been caused by * * suicide (felonious or otherwise, sane or insane,) or self-inflicted injuries, or by concealed weapons carried by the insured, or when the death or injury may have happened in consequence of * * exposure to any obvious or unnecessary danger, hazard, or perilous adventure unless in the laudable effort to save human life, or of violating the rules of any company or corporation; * * or when the death or injury may have happened while the insured was * * engaged in, or in consequence of any unlawful act; and this insurance shall not be held to extend to mysterious disappearances, nor to any case of death or disability, the nature, cause, or manner of which is unknown, or incapable of direct and positive proof."

Amongst the conditions it was provided:—

"Conditions—1. The party insured is required to use all due diligence for personal safety and protection," &c.

The attestation clause was as follows:—

"In witness whereof the Sun Mutual Life Insurance Company of Montreal has hereunto affixed its seal, and

caused these presents to be signed by its president and managing director, and attested by its secretary, and delivered at the head office in the City of Montreal, and this policy countersigned by William Morgan, general agent of this company at Windsor.

“Attest : H. MACAULAY, *Secretary*.

(Signed) “T. JAMES CLAXTON, *Vice-President*.

(Signed) “M. H. GAULT, *Managing Director*.

“Countersigned at Windsor this 18th day September, 1875.

(Signed) “WILLIAM MORGAN, *General Agent*.”

There was also a policy in the London Life Insurance Company. It was similar in form to the Sun policy above set out, except as regards the attestation clause. This was as follows:—“In witness whereof the London Life Insurance Company of London, Ontario, has caused these presents to be signed by its president, and attested by its secretary, and delivered at the head office in the City of London, and Province of Ontario, this 8th day of September, 1875.

“Attest: (Signed) “WILLIAM MARDON, *Secretary*.”

(Signed) “JOSEPH TIFFANY, *President*.”

None of the policies were under the defendants' corporate seals.

The deceased was found killed in a cattle guard, in a railway track at a railway station, having been run over by a passing train. One end of the platform of the station adjoined a street called Oak street, and the cattle-guard was placed at the side of the street, and near the end of the platform. There was no express evidence to shew how the deceased got into the cattle guard. The defendants set up that the deceased intentionally got into the cattle guard with a view of committing suicide. They further set up that the deceased fell into the cattle guard while attempting to get on to the platform from the opposite side of Oak street by walking along the railway track which crossed the street; and they urged in support of

this view that it was the one adopted by the plaintiffs in their proofs of loss.

The plaintiff contended that the presumption from the evidence was that the death was occasioned by the deceased, while walking along the platform, accidentally falling off into the cattle guard, and being there killed by the passing train.

For the defendants it was objected that the plaintiff could not recover because the policy was not sealed: that the burden of the issue of proving the accidental death was on the plaintiff, and if there be any doubt as to the cause of death, the plaintiff could not recover: that the policy was so worded so as to put such burden of proof on the plaintiff, and the evidence was certainly doubtful on that point: that the evidence shewed that the place was dangerous, and when this appears the case cannot be submitted to the jury.

The learned Judge refused to nonsuit, but left the case to the jury.

The jury found a verdict for the plaintiff in all the cases. They expressly found that the cause of death was by the deceased falling into the cattle guard accidentally.

In this term, May, 21, 1878, *Bethune*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiff, in each case, and for a new trial, on the ground that the paper produced as a policy was not sealed with the seal of the defendants, and that there was no evidence to go to the jury in support of the contention that the policy was sealed; and that upon the issue as to the alleged policy of insurance the defendants were entitled to a verdict, on the ground that the verdict was against law and evidence and the weight of evidence: that upon the issue as to exposure to danger on the part of the assured, the only evidence of how the deceased fell into the cattle guard shewed that he fell into the same while walking along the track of the railway near the crossing at Oak street; and that, having regard to the contract, that was such exposure to danger as

avoided the policy; and that the learned Judge at the trial misdirected the jury, in telling them that there was evidence to go to them of the death having resulted from an accident within the terms of the contract; and on the ground that under the terms of the contract, it not being certain as to how the accident occurred, the plaintiff could not recover.

During the same term, May, 31, 1878, *M. C. Cameron*, Q. C., shewed cause. As to the objection that the policies should have been sealed, this question was expressly left to the jury, and they have found that the policies were sealed. The attestation clause of the Sun policy expressly states the policy to be sealed. The circumstances under which the policies were issued are such as entitle the plaintiff to equitable relief, so that the policies should be deemed to be sealed, and the defendants estopped from setting up this defence, or to reformation of the policies by the addition of seals; and an equitable replication setting up these facts should be now allowed. Moreover, the Court may enforce these instruments as executory contracts to issue policies: *South of Ireland Colliery Co. v. Waddell*, L. R. 3 C. P. 463, L. R. 4 C. P. 617. The defence of suicide failed. Both at this and the former trial the learned Judge charged strongly against it, and the jury found for the plaintiff. Under these circumstances, the Court should not grant a new trial so as to give defendants another opportunity of raising this defence. As to the deceased having exposed himself to obvious and unnecessary danger, there was no evidence to support this. The contention is based on the assumption that the deceased was walking along the track and so fell into the cattle guard, while the more reasonable presumption is, and particularly so from the position in which the deceased was found, that while walking along the platform he accidentally fell off into the cattle guard. The cause of death was sufficiently proved. It is apparent that the death was caused by the deceased being run over by the passing train. The proviso merely applies, as it clearly

states, to mysterious disappearances or where the manner of death is incapable of proof.

Bethune, Q. C., contra. Under the Acts of incorporation, 28 Vic. ch. 43, sec. 9, (a), 37 Vic. ch. 85, sec. 7, O., of the Sun Mutual Company and the London Company respectively, it is essential that the policies of insurance should have been under seal. The cases clearly shew that seals are necessary: *Workman v. Royal Insurance Co.*, 16 Grant 185; *Hunt v. Wimbledon Local Board*, L. R. 3 C. P. D. 208; *Kelly v. Isolated Risk, &c., Insurance Co.*, 25 C. P. 299; *Montreal Assurance Co. v. McGillivray*, 13 Moore P. C. 87, 122, 124; *London Dock Co. v. Sinnott*, 8 E. & B. 347; *Houck v. Town of Whitby*, 14 Grant 671; *Brice on Ultra Vires*, 2nd ed., 652. There is no evidence of seals having been affixed, There is no mark of a seal, nor even the letters [L. S.] shewing any intention that a seal was to be affixed. The finding of the jury was therefore against the evidence, and a nonsuit should have been entered. The circumstances are not such as would furnish any grounds for equitable relief; at all events this was not raised at the trial, when it might have been fully answered; and if an equitable replication be now allowed, the defendants should be afforded an opportunity of answering it. The question whether these are to be considered good executory contracts has not been tried, and in any event there should be a new trial. The weight of evidence substantiated the defence of suicide, and the verdict of the jury was perverse. Then as to the deceased incurring obvious and unnecessary danger. The evidence would shew, and in fact this was the contention of the plaintiffs in the proof of loss, that the accident occurred in consequence of the deceased walking along the track, and such proofs operate as admissions against them. The proviso, however, is express that the nature, cause, or manner

(a) By 33 Vic. ch. 58, D., certain amendments to this Act were made, amongst which were, that the life and accident business should be a distinct branch: and by 34 Vic. ch. 53, D., it was enacted that the name of the company should be changed from "The Sun Insurance Company of Montreal" to "The Sun Mutual Life Insurance Company of Montreal."

of death must be clearly shewn, and not be merely a matter of conjecture, and the onus is on the plaintiffs to shew it: *Bliss on Life Insurance*, 2nd ed., sec. 265; *Skelton v. London and North Western R. W. Co.*, L.R. 2 C. P. 630. 636; *Lovell v. Accidental Death Ins. Co.*, "Post Magazine," Vols. 35, 36, 37, pp. 252, 419, 59; *Nicholls v. Great Western R. W. Co.*, 27 U. C. R. 3\$2.

September 5, 1878. HAGARTY, C. J.—In none of the cases is the policy stated in the declaration to be under seal.

The Sun Insurance Company is chartered by 28 Vic. ch. 43.

Section 19 says, that "All policies, cheques, or other instruments issued," &c., "by the said company, shall be signed by the president, vice-president, or managing director, and countersigned by the secretary, or as otherwise directed by the rules and regulations of the company, in case of their absence, and being so signed and countersigned, and under the seal of the company, shall be deemed valid and binding upon them," &c.

The London Insurance Company is chartered by 37 Vic. ch. 85, O.

Section 7 enacts: "No contract shall be valid unless made under the seal of the company and signed by the president or vice-president or one of the directors, and countersigned by the manager, except the 'interim receipt of the company,' which shall be binding on the company on such conditions as may be thereon printed by direction of the Board."

Now, assuming that these companies can only contract by policy under seal, the cases stand in a very peculiar position.

They were first tried at the Spring Assizes of 1877, before Mr. Justice Patterson, and verdicts entered for the plaintiffs, the defendants trying the cases on their merits, and no objections being raised as to the want of a seal to the policies.

In the following term this Court and the Court of Queen's Bench, on application of the defendants, decided in their discretion on ordering new trials on the merits.

This objection is now taken for the first time.

We may safely say that if the objection as to the want of seal had been urged to the Courts, some provision would have been made therefor, either in the shape of amended pleadings or making the withdrawal of this technical defence a condition of interference with the verdicts.

In any event the cases would hardly have been sent down with such a matter undisposed of.

We are disposed to agree with the defendants' counsel, that there was no legal evidence to submit to the jury on the issue of *non est factum*.

But we also think that it could be met by an equitable replication, setting out that (in the Sun Company cases) the policy delivered to deceased, and on which he paid the consideration, was subscribed with a declaration that the Company had thereunto affixed its seal, &c., and that all the legal formalities were declared to be observed, the secretary attesting, the vice-president and managing director and general agent signing, &c., and that on the faith thereof the deceased acted, etc. ; and that either the instrument should be reformed by the addition of the company's seal, or that the defendants should be debarred from setting up such a defence.

Under the old system a Court of Equity would, we consider, have compelled the defendants to seal the policies. We think this Court in the present state of the law can effect the same end, and the pleadings should be amended to meet the case.

Mr. Bethune, in his very able defence, urged that this ought not now to be done, as the defendants may have and have an answer to any application to compel them to complete the contract.

We do not think we can at this stage listen to this objection to the exercise of our statutory powers. It seems to us to be too late to go behind the policy itself.

We think the plaintiffs are entitled to have the policies executed as the law requires to bind the defendants. The secretary of the Sun Insurance Company deposed that for some time they issued policies unsealed though professing to be sealed. This would bring the omission of the seal within the definition of a common mistake in the contracting parties.

In the case of the London Company the attestation clause does not profess a sealing, but merely declares that, In witness whereof the company have caused these presents to be signed by their President, and attested by their Secretary, and delivered at their head office, &c.; yet they now point to their charter, which declares (sec. 7) that no contract shall be valid unless made under the seal of the Company.

Having obtained this very special clause from the Legislature, they adopt a printed form of policy omitting all reference to a seal, and (as it were) expressly directing and adopting an insufficient form of execution.

We are most unwilling to assume that this is done advisedly, and prefer hoping it was merely a negligent omission and mistake.

The rule for a new trial is on the following grounds, besides that of the absence of a seal—upon the law, evidence, and weight of evidence, and that upon the issue as to exposure to danger, the only evidence shewed that the deceased fell into the cattle-guard while walking along the railway track; and that, having regard to the contract, it was such an exposure to danger as avoided it; and for misdirection in telling the jury there was evidence to go to them of death from accident within the contract; and that under the contract, it not being certain how the accident happened the plaintiff cannot recover.

We cannot read the policies used by these Companies, (and possibly by others,) without the sense that they seem drawn to prevent, if possible, a recovery being had thereon in a great number of cases which men of ordinary intelligence would consider as falling within the description of

"accidents" in the common acceptation of the term, and such as would naturally be presumed to be covered by an "Accident" insurance. People may of course agree to any limitation of liability they may please, and if intelligent men choose to accept the minimum of protection offered to them, they must take the consequences.

The practical mischief is, as all lawyers know, caused by the general ignorance of persons taking accident tickets or interim receipts against accident, fire, etc., of the clauses and conditions which the underwriters reserve to themselves to insist on.

In the present cases the objections may be reduced to, (1.) Exposure to any obvious or unnecessary danger. (2.) That it fell within the contract as to "death the nature, cause or manner of which is unknown, or incapable of direct and positive proof.

We will first consider these, leaving the defence of suicide to be considered on the weight of evidence branch of the rule.

As to the exposure to danger. It was urged that deceased must have been walking on the track when he fell into the cattle-guard.

It is not clear on the evidence how this was. He may have walked on the track and fallen therefrom, or he may have fallen from the platform.

If he walked on the track it could only have been for the breadth of Oak Street.

Mr. Bethune was good enough to hand to us some numbers of the "Post Magazine" for the years 1874, 1875, 1876, vols. 35, 36, 37, pp. 255, 419, 59, in which we find reports of a case of *Lovell v. Accident Insurance Co.*, which by some curious neglect is not to be found in the regular reports. It was tried twice, with verdicts for the plaintiff. Both were set aside, and ultimately there was a verdict for the defendants.

The first trial was in June, 1874, before Sir A. Cockburn, C. J., vol. 35, p. 255. There was the clause as here, "doing any unlawful act or exposing himself to any obvious risk or danger."

At Blisworth Station on the London and North Western Railway, he, about nine or ten on a dark night, started to cross and walk along the tracks to reach his residence by a short cut, where there was no crossing or bridge.

There was a six foot way between the up and down track, and it would seem that he must have walked a mile and a half along it before he was killed. His body was found next morning. It was supposed that he was looking to and trying to avoid the slow train going up when the fast mail train coming down dashed by, and caught him, and he was killed. The Chief Justice, in answer to the argument that the danger must be obvious to the senses, said to the jury, "No doubt the deceased, in order to avoid a circuitous route, had got upon the line, and was walking on the 'six foot' at the time he received the injury. Was that exposing himself, not, indeed, to positive certain death, but to positive certain danger of it? And was it not 'obvious' danger? Moreover, the unfortunate man must have been walking so near to the line—the 'off' rail of the 'down' line—that one of the vans caught him on the shoulder as it passed and smashed his shoulder and caused his death. Was this, or was it not, exposing himself to 'obvious' danger? It was impossible to say that he would not be exposing himself to obvious risk unless he actually saw a train coming. It was enough if the danger was certain and ought to be present to the mind of a man of ordinary sense and prudence."

This was a very plain case. Walking a mile and a half on a dark night on a six foot way on perhaps the most crowded railway in England, with up and down trains constantly passing, where four tracks have since been found necessary for the great traffic, seems certainly an exposure to obvious and unnecessary danger. But the case before us is very different. We can hardly regard this as a case of walking on a railway track in the ordinary sense. It was simply using the track the width of a street, not the kind of "walking on the track," against which prohibitions are levelled.

Such a thing would be hardly more remarkable than the perpetual crossing of the Grand Trunk and other tracks in Toronto, which the wisdom of the constructors of the Union Station forces on the thousands who desire to travel by rail.

It does not follow that because the plaintiffs, in seeking to give all the information in their power to the Company, have assumed that he did walk these few steps on the track, that the jury had to so assume. He might just as probably have fallen from the platform.

On the whole we cannot hold that the jury have erroneously found this against the defendants.

On the second point, that the nature, cause, and manner of the death were unknown and incapable of positive proof.

The true meaning of this clause appears from the context * * * "The insurance shall not be held to extend to mysterious disappearances, nor to any case of death or disability, the nature, cause, or manner of which is unknown or incapable of direct and positive proof."

We think it would be a perversion of the true meaning of this clause to hold that where the immediate cause of death is indisputable and evidenced by outward violence caused by a train running over the body, and an accident *primâ facie* within the direct meaning of the insurance, it can be any objection that no human eye witnessed the precise manner in which the deceased fell into or got into the cattle guard.

A large proportion of accidental deaths occur under such circumstances that evidence is wanting as to the precise manner in which the deceased met his fate. Where the visible injuries plainly account for death it can hardly be necessary to explain step by step how it happened.

If we rightly appreciate the argument advanced by the defendants, they seem to urge an opposite conclusion.

On this point we refer to an instructive decision of a Court of Error, *Trew v. Railway Passengers' Assurance Co.*, 6 H. & N. 839, where it was held that it was a proper question to be submitted to the jury whether the deceased

died from the action of water or from natural causes. He had gone alone to bathe in the evening, and his body was found some weeks after in a distant place on the coast. The question seemed to be, did he die by drowning or by apoplexy in the water. There was no direct evidence one way or the other. The provision was, that "no claim shall be made under this policy by the assured in respect of any injury, unless the same shall be caused by some outward and visible means of which satisfactory proof can be furnished to the directors." The nonsuit allowed in the Court below was set aside in Error.

Cockburn, C. J., says, at p. 844: "We ought not to give to those policies a construction which will defeat the protection of the assured in a large class of cases. We are therefrom of opinion that, if there was evidence for the jury that the deceased died by drowning, that was a death by accident within the terms of this policy."

We also refer to *Fitton v. Accidental Death Ins. Co.*, 17 C. B. N. S. 122. The case is very instructive in its facts.

Willes, J., says, at p. 134: "It is extremely important with reference to insurance, that there should be a tendency rather to hold for the insured than for the company, where any ambiguity arises upon the face of the policy."

The main defence on the merits was suicide. The proof of this defence lay on defendants. Two juries have pronounced against them. Both the learned Judges who presided declare themselves not dissatisfied with the finding.

A very careful examination of the evidence has brought us to the conclusion that we ought not to interfere.

We may go further, and state that we cannot say that it was not a proper finding upon the evidence or the weight of evidence.

There is no presumption in favour of such a defence. The defendants undertake to shew affirmatively that the death was suicidal. It is unnecessary for us to state the voluminous evidence. It was doubtless a very natural suspicion under the very peculiar circumstances. The very large amount of insurance, between \$20,000 and \$30,000,

involving an outlay somewhat disproportionate to the apparent means of deceased, was alone extraordinary. Certain ambiguous expressions and letters were relied on. But against these were urged arguments worthy of consideration, founded on the rooted love of life existing in all sane persons; on the unimpeached sanity of deceased; on the well known existence of peculiar fancies and habits in individuals, *e. g.*, the dread of some peculiar danger, such as railway accidents, dread of robbers, &c., inducing an unusual desire to guard against such perils, &c., &c.

We think this is a case in which those called on to decide the question of fact should require proof amounting to something like reasonable conviction: that any weakness or deficiency in the proof, or any failure to lead to such conviction, must properly tell against those urging it.

The burden is on the defendants to excuse their liability. We are not prepared to say that they have done so.

The rule will be discharged, the pleadings to be amended.

GWYNNE, J.—After a careful consideration of these cases I arrive at the conclusion that whatever suspicion the fact of the insured having recently before his death effected insurances against accident to a very large amount was calculated to excite, the verdicts of the juries upon the plea of suicide cannot be said to be against evidence or the weight of evidence.

If I were acting as a juror I am obliged to confess that upon the same evidence I should render the same verdict.

I am of the same opinion when I observe the condition of the place where the death occurred, as shewn upon the plan produced in evidence, in respect of the issues joined upon the fourth and subsequent pleas.

The jury, I think, may well have come to the conclusion that the accident occurred by the deceased having fallen into the cattle guard, where he was killed, from the platform of the railway company, after he had reached that platform through the little wicket gate close by, constructed by the company as a mode of access for the passengers coming to their station.

Were I acting as a juror, I could not say that the evidence establishes that the deceased fell into the cattle guard from the railway. I confess that it appears to me to be much more probable, having regard to the place where deceased was found killed, that he fell in from the platform.

Upon the point arising under the plea of *non est factum* and the general issue in the cases in which the policy is not declared upon as a deed, I concur with the Chief Justice in thinking that under the circumstances referred to by him we should not permit this objection now made to prevail; and that we have power under the Acts for the better Administration of Justice to allow such an equitable replication to those pleas to be filed as would justify us in restraining the defendants from relying upon those pleas.

Mr. Bethune in his able argument for the defendants admitted, as I understood him, that the Court has sufficient power to authorize now such a replication, and that when allowed its undoubted effect would be to deprive the defendants of all benefit from the objection which they now rely upon arising from the want of seals to the policies; but he contends that when the replication should be filed, as it raises an equitable consideration as against a legal plea, the case should be tried over again by a Judge without a jury; and he says that if the case had been tried before a Judge without a jury that objection would not have been raised.

I do not think we can yield to this argument, or that allowing the replication we should now order a new trial before a Judge alone without a jury, inasmuch as we feel compelled to concur with the verdict of the jury upon all the other issues.

It may be that when there is any pleading of an equitable nature, the whole case upon all issues, legal as well as equitable, is properly triable by a Judge without a jury; but I do not think the fact that such a case has been tried by a jury is a sufficient reason for setting aside the verdict of the jury, and directing a new trial before a Judge without a jury, where we are obliged to admit that the verdict

of the jury upon the evidence is unobjectionable ; nor can I say that, if the equitable replication had been filed, it would have been incompetent for a Judge to call a jury to try the other legal issues.

I think that such a replication as should justify the Court in restraining the defendants from relying upon any such objection to the form of the policies, can upon the evidence be filed, and that it may be filed *nunc pro tunc*, and that upon its being filed the verdicts of the juries should stand in all the cases.

GALT, J., concurred.

Rules discharged.

O'CONNOR v. McNAMEE.

Bill of costs—Action on—Agreement that costs should not exceed a fixed amount—Reception of evidence—New trial.

In an action on a bill of costs the question was, whether an agreement had been made by an attorney, the plaintiff, that the costs should not exceed a certain amount, which had been paid. The jury found the agreement to have been made, and gave a verdict for the defendant. A new trial was moved on the ground that evidence had been received and a discussion allowed to take place at the trial as to the magnitude of the bill, and of the large amount of costs paid by defendant in the same suit to other attorneys, which influenced the jury in their finding. *Held*, GWYNNE, J. doubting, that this was not a sufficient ground for interference, the jury having been expressly told that the fact of the making of this agreement was the only question for their decision.

THIS was an action tried before Armour, J., and a jury, at Toronto, at the Spring Assizes of 1878.

The plaintiff was a professional gentleman who was employed by the defendant to conduct certain proceedings in the Court of Chancery. The claim was on a bill of costs, amounting to \$775, of which \$300 had been paid by the defendant.

The defence was that the plaintiff agreed to conduct the business for \$200, and that the defendant had already paid that amount and an additional sum of \$100.

The evidence was conflicting. The plaintiff denied that he had made such an agreement, while the defendant averred that he did, and this was partly corroborated by two other witnesses.

The learned Judge left the question to the jury with the following direction: "The principal question that I shall leave to you is this: If you come to the conclusion that there was an agreement made in Ottawa between McNamee and O'Connor, that O'Connor should receive \$200 in full of the costs of this contemplated proceeding, and the proceedings which he performed afterwards were under that contemplation. If that was the agreement, you will find a verdict for the defendant." The learned Judge then referred to the evidence, calling the attention of the jury to certain of the circumstances. He then said: "If you come to the conclusion that there was no such bargain between the plaintiff and defendant as is alleged, then you will find a verdict for the plaintiff for the whole amount claimed, less the \$300 that has been paid on account."

The learned Judge then made some observations on the magnitude of the plaintiff's bill of costs and on the question of costs generally, and indicated his opinion, that if such costs were usual, some alteration in the administration of justice should be made. He then concluded as follows: "But with all that you have nothing to do. You have only to do with what is here before you to-day. You have to say whether or not this bargain was made at Ottawa on July the 9th between these parties. If it was, your verdict will be for the defendant. If it was not, your verdict will be for the plaintiff for the sum of \$475, which I shall direct to be taxed by the proper officer of the Court."

In this term, *F. Arnoldi* obtained a *rule nisi* to set aside the verdict for the defendant, and to enter a verdict for the plaintiff, or for a new trial, on the ground that the trial had in this cause was not a fair trial, in this, that the learned Judge before whom the same was tried allowed

matters wholly extraneous to the issue to influence the course of the trial and the minds of the jury, and introduced extraneous matters into his charge to the jury, and prejudiced the jury against the plaintiff's case; and for misdirection in this, that the learned Judge said to the jury in his charge that because defendant had paid large sums for other costs in the same suit to solicitors other than the now plaintiff, he thought it was a question if he should now pay the plaintiff, the plaintiff in fact not being in any way interested in the sums defendant alleged he had so paid to other solicitors; and because the bargain alleged, and relied on by the defendant, even if the defendant's evidence is believed, was and is illegal, and is no defence to this action; and because the verdict is against law and evidence, and the weight of evidence, and because on the whole case the verdict should be for the plaintiff.

During the same term, June 7, 1878, *Monkman* shewed cause. As to the admissibility of the evidence as to the magnitude of the bill of costs, and of the costs incurred to other solicitors, no such objection was taken on the trial, and it cannot be raised now. The evidence was properly admitted, as it could not be excluded. The learned Judge, though commenting on the matter, as he had a perfect right to do, only left what was material to the jury, for he expressly told them that the only question for their decision was, whether the contract was made or not. The case of *Doherty v. Williams*, 30 U. C. R. 215, shews that great latitude is allowed to a Judge in charging the jury, and that strong expressions of opinion form no ground for a new trial. Moreover, misdirection is no ground for a new trial, where there is other evidence, as here, to support the verdict, or unless it is shewn that some substantial wrong has ensued thereby; *Burns v. Kerr*, 13 U. C. R. 458; *Appleton v. Lepper*, 20 C. P. 138; *Dundas v. Johnson*, 24 U. C. R. 547; *Kyle v. Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76. Then as to the validity of the instrument, this also was not taken at the trial, and cannot be raised now. The cases shew that the agreement is valid :

Parker v. Harcourt, 5 Esp. 249; *Ashford v. Price*, 3 Stark. 185; *Re Geddes et al.*, 2 Ch. Chamb. 447; *Foley v. Smith*, 20 L. J. N. S. 621.

Ferguson, Q. C., and *F. Arnoldi*, contra, There was misdirection in the admission of the evidence, and the learned Judge's comments thereon. It clearly influenced the jury in their finding, although the only question left to them was the making of the agreement. On this ground there should be a new trial. Then as to the agreement, it is illegal, and cannot be enforced, particularly when it is proved to have been made beforehand: *Daniell's Chy. Prac.*, 4th ed., 1738; *Re Newman*, 30 Beav. 196; *Re Crawley*, 18 W. R. 1125; *Pince v. Beattie*, 11 W. R. 979; *Hope v. Caldwell*, 21 C. P. 241; *Pulling on Attorneys*, 3rd ed., 333. In *Re Geddes et al.*, 2 Ch. Chamb. 447, a distinction was attempted to be raised between where the attorney and the client is attempting to enforce the agreement, but this is not borne out by the authorities. *Foley v. Smith*, 20 L. J. N. S. Ch. 621, is not in point: that was a case of principal and agent. Even if the objections were not taken at the time, the plaintiff is not precluded from now setting them up; *Warner v. Kline*, 17 C. P. 287; *Paton v. Currie*, 19 U. C. R. 388. An agreement of this character must be clear and definite, and supported by the clearest evidence. It is not shewn that the agreement was to cover or was contemplated to cover the services charged for in the bill of costs. The evidence negatives the actual making of the agreement; but even if there is any doubt as to the effect of the direct evidence on the point, the facts negative the possibility, or at any rate the probability, of such agreement having been entered into. The defendant's own letters ignore the making of any such agreement. If the agreement is invalid, or there is no agreement, then the plaintiff is entitled to recover for costs incurred.

September 5, 1878. HAGARTY, C. J.—It is argued that the large amount of costs incurred in this case has been improperly allowed to enter into the discussion, and to exercise an influence on the jury.

I do not see how it was possible to exclude the evidence given on this head by the defendant.

The issue was not how much costs he ought to pay, but whether an agreement had been entered into by his legal adviser, that certain contemplated proceedings should not involve him in an expense greater than a named sum. This was asserted and denied with equal positiveness.

The defendant's case is, that having already become liable to a very large amount of costs, large beyond all ordinary expectation, he was most anxious to form some idea of the probable cost of getting his case to a hearing, being in doubt whether he would abandon all further proceedings or not.

To a man with a heavy suit on hand, in the very peculiar position of this defendant, it was most natural that he should try to ascertain some limit to future expenditure.

I think it would be impossible in taking the evidence of the plaintiff, the defendant, and of Mr. Cotton, and in commenting on it to the jury, for either counsel or Court to make no reference to the position of the defendant in respect of costs incurred or to be incurred.

Nothing is more common than for a man contemplating litigation to ask his legal adviser the probable cost, and nothing is more important in deciding on such litigation than honest advice as to such cost. The defendant had a right, I think, to shew any special reasons for his anxiety, either to ascertain the limit of expense, or to obtain an undertaking that a named limit should not be exceeded. Already, in a cause not ripe for hearing, costs were claimed against him to the rather startling amount of \$2,800.

We can well assume the extreme likelihood of his asking for a limit.

He swears positively to the limit of \$200 to bring the case to a hearing.

The witness Cotton says: "McNamee appeared to have such a horror of costs, from the amount of the other bill, that he wanted to ascertain about what the amount would be that he would have to pay O'Connor."

Nor would it be possible in my judgment to withhold from the jury the large amount of costs claimed by the plaintiff in obtaining the injunction, being nearly four times the amount named, viz., \$200, nor the circumstances attending the ultimate fate of this most unfortunate suit.

I quite agree that the only issue was, not the amount of the plaintiff's demand, which would of course be subject to taxation, but whether there had or had not been an agreement limiting the plaintiff's claim to \$200, and, if so, whether such claim had been paid.

It was a fair question to be decided by the jury on hearing and seeing the witnesses. They have decided against the claim, and I do not see my way to interfering. Had they found for the plaintiff, my course would be the same.

GWYNNE, J.—I confess I should prefer taking the opinion of another jury upon the only question in issue, namely, whether the special contract relied upon by the defendant was made by the plaintiff; for I cannot divest my mind of the idea that the jury have suffered themselves to be unduly influenced to the prejudice of the plaintiff by the magnitude of his bill of costs. With that magnitude we have nothing to do. If the bill is exorbitant, having regard to the services rendered, the Court in which those services were rendered is the competent, and, I think, the proper tribunal to redress the grievance. If the bill is not exorbitant in the opinion of that Court, having regard to the services rendered, then, undoubtedly, the plaintiff is entitled to recover whatever sum the proper officer of that Court, with the approbation of the Court, should tax to him, unless the plaintiff made the special contract which the defendant says he did, and which the plaintiff emphatically denies; and in arriving at a just verdict upon this question, the jury should not be influenced, as I fear they have been, by the apparent magnitude of the bill.

The amount which the defendant says he paid before he retained the plaintiff may perhaps be regarded as tending

to support the probability that the defendant would be likely to desire to make such a contract with the plaintiff as he says he made when he retained him, but on the contrary, if the plaintiff's charges are reasonable, as to which I form no opinion in the absence of taxation, that would seem to afford equally good evidence of the improbability of the plaintiff making a bargain to render to the defendant for \$200 services, for which \$775 is only a reasonable charge.

GALT, J.—In the rule *nisi* there are observations made on the remarks of the learned Judge in commenting on the evidence on the amount of costs to which the defendant had been put in the Chancery proceedings to which he had been a party. I can only say I have read the evidence of the defendant with astonishment, as respects the expense to which he had been put. I do not understand the learned Judge to make any reflections on the plaintiff, or any other person, as respects these costs, and I certainly do not desire to make any, but the amount might naturally have the effect of inducing the defendant to pause before proceeding further, and would, as he swears it did, make him hesitate and anxious to know what additional cost would arise, in consequence of which, he avers, he made the agreement with the plaintiff that the costs were not to exceed \$200. This was the sole contention at the trial. The observations of the learned Judge were directed to the question of costs generally, and indicated his opinion that some alteration in the administration of the law should be made, if such costs were usual. He then concludes as follows: "But with all that you have nothing to do. You have only do deal with what is here before you to-day. You have to say whether or not this bargain was made at Ottawa on July the 9th between these parties. If it was, your verdict will be for the defendant. If it was not, your verdict will be for the plaintiff for \$475, which I shall direct to be taxed by the proper officer of the Court."

The jury were of opinion that the bargain was made, and they found a verdict accordingly.

I do not think we can interfere. Had the verdict been the other way I should not have interfered.

The rule will, therefore, be discharged.

Rule discharged.

MEMORANDA.

During Easter Term, the following gentlemen were called to the Bar :—

THOMAS GRAVES MEREDITH, THOMAS PERCIVAL GALT, OLIVER RICHARD MACKLEM, DONALD MALCOLM CHRISTIE, TREVELYAN RIDOUT, DAVID BURKE SIMPSON, PETER JAMES MILLS ANDERSON, JOHN AUSTIN WORRELL, GEORGE WASHINGTON WELLS, JAMES CRAIG, JOHN NICHOLLS, WILLIAM GEORGE MURDOCK, ALFRED MACDOUGALL, HENRY RYERSON HARDY, FREDERICK VAN NORMAN, AUGUSTUS HENRY FRASER LEFROY, THEODORE KING.

IN THE
COURT OF QUEEN'S BENCH
AND THE
COURT OF COMMON PLEAS.

Regulae Generales.

Easter Term, 41 Victoria.

It is ordered that the real representative acting under the Act respecting the partition and sale of real estate, (Revised Statutes of Ontario, ch. 101,) shall, in the case of proceedings being instituted in the Court of Queen's Bench or Common Pleas, or a County Court, be entitled to demand and receive for all services performed by him under the said Act, the same fees, as near as may be, which are allowed by the Court of Chancery to local masters or special examiners for similar services.

(Signed) JOHN H. HAGARTY.
ROBERT A. HARRISON.
THOMAS GALT.
J. D. ARMOUR.

Thursday, 6th June, 1878.

IN THE COURT OF COMMON PLEAS.

Regulae Generales.

Easter Term, 41 Victoria.

On Thursday, the 6th day of June, A.D., 1878, a rule of Court was made under 39 Vic. ch. 8, sec. 5, O., dispensing with the Sittings of the Court of Common Pleas during the time appointed for holding Trinity Term.

MEMORANDA.

During Trinity Term, the following gentlemen were called to the Bar :—

HENRY PIGOTT SHEPPARD, ISAAC CAMPBELL, ALLEN BRISTOL AYLSWORTH, RICHARD DULMAGE, HARRY THATCHER BECK, MATTHEW WILSON, WILLIAM HENRY FERGUSON, WILLIAM EDWIN HIGGINS, JAMES CARRUTHERS HEGLER, FREDERICK WILLIAM PATTERSON, EUGENE LEWIS CHAMBERLAIN, MAXFIELD SHEPPARD, NEIL A. RAY.

MEMORANDA.

In Trinity Vacation, on the 13th day of November, 1878, the Honourable ADAM WILSON, senior puisne Judge of the Court of Queen's Bench, was appointed Chief Justice of this Court, in the place of the Honourable JOHN HAWKINS HAGARTY, appointed Chief Justice of the Court of Queen's Bench, in the place of the Honourable ROBERT ALEXANDER HARRISON, deceased.

MICHAELMAS TERM, 42 VICTORIA, 1878.

From November 18th to December 7th.

Present :

THE HON. ADAM WILSON, C. J.

“ “ JOHN WELLINGTON GWYNNE, J.

“ “ THOMAS GALT, J.

MACDONALD V. THE CORPORATION OF THE TOWNSHIP OF
SOUTH DORCHESTER.

Bridge—Want of repair—Liability—Evidence.

In an action against defendants for damage sustained by the plaintiff through the breaking down of a bridge some six feet wide built on three sleepers over a culvert on a road in defendants' township, over which the plaintiff was attempting to drive with a buggy and a pair of horses, it appeared, from an examination after the accident, that the centre sleeper to two-thirds of its diameter and on the outside was quite rotten, and that its condition was either not ascertained by the persons whose duty it was to repair the bridge, or, if ascertained, it was not repaired, and that the bridge broke down in consequence of this centre sleeper giving away by the mere entry of the plaintiff's horses, without the buggy, upon the side of the bridge. The jury having found for the plaintiff their verdict was upheld.

THIS was an action brought by the plaintiff for injuries sustained by him through the breaking down of a bridge over a culvert on a road in the township.

The cause was tried before Wilson, J., and a jury, at St. Thomas, at the Spring Assizes of 1878.

The culvert was two or three feet wide. The bridge over the culvert was about six or seven feet in length. It was built on three sleepers laid across the culvert.

The evidence shewed that on the day of the accident the plaintiff was driving a buggy and a pair of horses; and

on arriving at the bridge, and attempting to drive over it, as the horses got on to the bridge, the centre sleeper broke and the bridge caved in, and the plaintiff was thrown out of his buggy and injured. The buggy and harness were also damaged.

The plaintiff stated that he had driven over the bridge about a year before, when the same sleeper was out of order, of which he informed one Comer, the pathmaster, and told him that unless it was looked after the plaintiff might be injured, when the pathmaster said it would have to be fixed. The plaintiff also stated that he subsequently passed over it between that time and the day of the accident, but could not see that it had not been repaired.

It appeared that shortly before the accident a number of heavy teams, as also a number of waggon loads of people, had passed over the bridge.

Comer, the pathmaster, whose duty it was to examine the bridge, was called as a witness for the defence. He stated that he had examined it before the accident. He said that he took his spade and went to the bridge to see if it was safe. He hit his spade against all the stringers, and took up the planks to do so, and thought the pieces were perfectly safe. He would have risked his own life on them. Under the planks it was dozy, but at the sides and bottom they were sound by his trial. He was certain that he put that stringer in himself. It was not more than three years before that. It was a sound green stick when he put it in. He thought it was as good yet. He could not see from the outside that there was anything wrong with the stringer. There had been no want of care on his part. He stated that he did not remember the conversation referred to by the plaintiff.

For the defence it was urged that the accident was caused by the plaintiff attempting to drive over the bridge, at too great a rate of speed.

This was denied by the plaintiff. He said that he was driving very slowly, the horses being at a walk, and that the mud was too deep to permit him driving fast.

It was also urged for the defence that the sleeper broke in consequence of the plaintiff driving on one side of the bridge, within six inches of the side, so as to throw the whole weight on the sleeper.

It appeared on examination of the sleeper after the accident that to two-thirds of its diameter and on the outside it was quite rotten.

The defendants moved for a nonsuit on the ground that no negligence was proved.

The learned Judge refused to nonsuit, but reserved leave to the defendants to move.

The learned Judge left the following questions to the jury:—

1. Did the plaintiff drive on to the culvert in a furious manner? Ans. No.

2. If he did, was that the occasion of the bridge breaking down? Ans. No.

3. Was the culvert in a fit and reasonable state of repair for the public use and safety? Ans. No.

4. If it was not, did the defendants take proper means to ascertain whether the bridge was sufficient or not?

5. And if they did, did they fail to discover the defect? or

6. If the culvert was not sufficient, had the defendants any reason to believe that the culvert was not sufficient? Ans. They had.

7. Was the plaintiff personally injured, or was his buggy and harness damaged by the breaking through of the culvert? Ans. Yes.

8. If so, to what extent was the plaintiff injured, or was his property damaged? Ans. Yes; slightly injured.

9. I ask the jury also to say whether the plaintiff drove on to the bridge on an improper part of the bridge. Ans. No.

The learned Judge on these questions entered a verdict for the plaintiff, and the jury assessed the damages at \$150.

In Easter term, May 22, 1878, *J. K. Kerr*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiff, and to

enter a nonsuit pursuant to leave reserved at the trial ; or for a new trial, on the ground that there was no evidence of negligence on the part of the defendants, or that the injuries complained of by the plaintiff were occasioned by the negligence of the defendants ; and that there was no evidence of notice to defendants that the place where the alleged injuries were sustained, was in a dangerous condition, and that the evidence established that the plaintiff was guilty of contributory negligence, and by such negligence contributed to the accident which occasioned the alleged injuries.

In this term, November 22, 1878, *O'Sullivan* shewed cause. The defendants set up, that the defendants had no notice of any defect ; and that the plaintiff was guilty of contributory negligence. As to the first point, the evidence shews that there was notice to the pathmaster, whose duty it was to have seen that the bridge was in proper repair. There is no question that the bridge was out of repair. If the pathmaster had, instead of merely hitting the sleepers with a spade, bored into them, he would have discovered the defect. The defendants cannot avail themselves of the neglect of their own officer to make a proper examination. There is no evidence of contributory negligence. The only evidence as to the plaintiff's mode of driving was his own, and he distinctly states not only that he was driving slowly, but at a walk ; and in fact the evidence shewed that the mud was too deep to permit fast driving. All the questions put to the jury have been found in the plaintiff's favour. He referred to *Denny v. Montreal Telegraph Co.*, 42 U. C. R. 577 ; *Boyle v. Corporation of Dundas*, 27 C. P. 129 ; *Pennsylvania and Ohio Canal Co. v. Graham*, 63 Penn. 290 ; *Ralpho and West Hempfield Townships v. Moore*, 68 Penn. 404 ; *Colbeck v. Corporation of Brantford*, 21 U. C. R. 276.

J. K. Kerr, Q. C., contra. There was no notice to the defendants of any defect. The evidence shews that the sleeper was apparently sound ; and the pathmaster did all in his power to ascertain its condition. The reason that

its true condition was not discovered was that it was only unsound at the particular point where it parted. The evidence also shews that numbers of loaded waggons had passed over the bridge shortly before the accident happened. The way timber is always tested is, by striking it and then listening to the sound. If the mode suggested by the plaintiff had been adopted, namely, of boring into the sleepers, this would certainly have had the effect of weakening them. Under the circumstances the defendants cannot be said to have had notice of the defect. There was, however, evidence of contributory negligence. The plaintiff knew a year before that this bridge was defective, and he subsequently passed over it several times and saw that nothing had been done. He should not, therefore, have gone over the bridge, but taken a different road. Moreover, knowing that this particular sleeper was defective, he should not have driven over it so to throw the whole weight upon it: *Burns v. Corporation of Toronto*, 42 U. C. R. 560; *Boyle v. Corporation of Dundas*, 27 C. P. 129.

December 7, 1878. GWYNNE, J., delivered the judgment of the Court.

The jury, in answer to certain questions put to them by the learned Chief Justice of this Court, before whom the case was tried, have found as facts: 1. That the bridge was not in a fit and reasonable state of repair for the public use and safety. 2. That the defendants did not take proper means to ascertain whether it was sufficient or not. 3. That they had reason to believe it was not sufficient. 4. That the plaintiff did not drive on to it in a furious manner, nor, 5, did he drive on an improper part of it.

Now, if these matters have been properly so found, there can be no doubt of the defendants' liability in this action, and it is impossible for us to say that they were not properly so found in presence of the unquestioned facts, that the string piece which gave way, which caused the accident, and which was the centre one of three which supported the travelled way, was for two-thirds of its diameter,

and that upon the outside, quite rotten; and that this, its condition, was either not ascertained by the persons whose duty it was to inspect the bridge and to see that it was kept in a proper state of repair, or, if ascertained, that it was not replaced by another sound one, and that the centre stringer gave way by the mere entry alone of the plaintiff's horses, without his buggy, upon the side of the bridge.

It is obvious that in cases of this kind the question of neglect or no neglect upon the part of the defendants is one which must always be considered relatively to the particular subject in respect of which the neglect is charged, to the purpose which it has to discharge, and to the gravity of the consequences probably attendant upon the neglect charged; for example, a greater degree of care and inspection is necessary in attending to the condition and state of repair of a bridge than of a plank sidewalk; and in proportion as the defect may be more likely to take place in a hidden part than in a part exposed to view, so is it more necessary that particular inspection of the hidden part should be made from time to time in the manner best calculated to ascertain any defect not openly apparent; and by so much as a loose or defective plank, timber, or sleeper in a bridge is calculated to be attended with more serious consequences than a loose or defective plank or sleeper in a sidewalk, by just so much are greater care and attention necessary to be displayed in looking after the condition and state of repair of a bridge than of a sidewalk.

Consistently with the cases to which we have been referred, we cannot interfere with the verdict. To have directed a nonsuit would have been impossible. The questions submitted to the jury were proper questions to be submitted to them, and I do not think any fault can be fairly found with their answers to them. Had the case been tried before me without a jury, I think I should have arrived at the same conclusion.

The rule will be discharged, with costs.

Rule discharged.

REGINA V. DUFF.

Bigamy—Proof of prior marriage.

On a trial for bigamy, in proof of an alleged prior marriage, a deed was produced executed by the prisoner, containing a recital of the prisoner having a wife and child in England, and conveying certain lands and premises to two trustees, in trust to receive and pay over the rents and profits to such wife and child; but with a power of revocation to the prisoner. B., one of the trustees, proved that at the time of the execution of the deed the prisoner informed him that he had quarrelled with his present wife, and had a law suit with her: that the place had been bought with the first wife's money, and he wished it to go to her; and that he requested B. to act as trustee and to receive and pay over to them the rents and profits, but B. never paid anything over, nor had he ever written to or heard from such alleged wife.

Held, that this was not sufficient evidence to prove the alleged prior marriage.

THIS was a case reserved by Burton, J. A., at the last Fall Assizes, at the City of Hamilton.

The prisoner was indicted for bigamy, and he was proved to have been married to one Amelia Mitchell in September, 1872.

In proof of an alleged prior marriage a deed was produced executed by the prisoner, and made between the prisoner, described as of the City of St. Catharines, in the County of Lincoln, of the first part, and Richard Browne, of the said City of St. Catharines, tailor, and Thomas Beattie, of the same place, shoemaker, of the second part. By this deed,—after a recital of the prisoner being seized or entitled to certain land and premises in the said City of St. Catharines; and a further recital that “the said party of the first part being desirous of making some provision for his wife and daughter hereinafter respectively mentioned, namely, Sarah Duff, of the Town of Swansea, Glamorganshire, Wales, in the United Kingdom of Great Britain and Ireland, and Selena Hannah Duff, of the same place, has agreed and determined to grant and convey unto the said parties of the second part,” &c.,—it was witnessed that in consideration of the premises, and of the natural love and affection of the said party of the first part “for his wife and child hereinbefore named,” the

said party of the first part did grant and convey unto the said parties of the second part the said land and premises, describing them, to have and to hold the same in trust, to pay the rent, issues, and profits to the said Sarah Duff and Selena Hannah Duff in the manner therein recited. The deed concluded with a power of revocation to the prisoner.

Richard Browne, one of the above named parties, was called as a witness for the Crown. He proved the execution of the deed. He stated that at the time the deed was executed he had some conversation with the prisoner about the subject matter of the deed: that the prisoner told him that the present wife and he could not agree, and that they had a law suit: that the money that bought the place belonged to his first wife, and that he wanted it to go to the right one: that the prisoner told him that the first wife was in England: that he, witness, was to receive the rents and profits, and send them every three months to the first wife, who lived in the old country: that he gave him the address where she was living: that Sarah Duff was her name, as witness understood from her having married the prisoner: that he did not tell witness what her maiden name was. Witness said that the prisoner told him that he had left his first wife because she was not true to him. Witness further said that since the execution of the deed he had been receiving the rents and profits, but had sent none away, and that he had never communicated with the alleged wife in England, or received any communication from her.

Elizabeth Browne, the wife of the last witness, stated that she heard the prisoner ask her husband to be a trustee for his wife and child in England.

The alleged second wife was called as a witness, but in view of the decision of the Court it is unnecessary to give her evidence.

The prisoner was found guilty; but a case was reserved for the opinion of the Court as to whether there was sufficient evidence of the marriage of the prisoner to Sarah Duff, who was alleged to be his first wife, and living at the time of his marriage to Amelia Mitchell.

In this term the case was argued.

November 30, 1878. *Robertson*, Q. C., for the prisoner. The admissions in the deed, and to the witness Brown, are not sufficient evidence of the first marriage to warrant a conviction for bigamy: *Taylor* on Evidence, 7 ed., vol. i, p. 180-1, 494, secs. 172, 578; *Morris v. Miller*, 4 Burr. 2057. In *Regina v. Newton*, 2 M. & Rob. 503, S. C., by the name of *Regina v. Simmonsto*, 1 C. & K. 164, an admission was held to be sufficient, but this was overruled in the subsequent case of *Regina v. Flaherty*, 2 C. & K. 782, where it is said that the prisoner might for a purpose have stated an untruth. The Crown principally rely on two cases in Lower Canada cited in *Taschereau's Criminal Acts*, vol. i., p. 329. The first case is *Regina v. McQuiggan*, 2 Lower Can. 340, 346. In that case there was something more than a mere admission, for there the prisoner pleaded guilty of the offence before the magistrates. The second case is *Regina v. Creamer*, 10 Lower Can. 404. This is clearly distinguishable. There the prisoner gave all the particulars of the marriage, and at the trial before the magistrate the prisoner, in the presence of the alleged first wife, pleaded guilty, and the alleged first wife was present at the trial of the indictment.

J. G. Scott, Q. C., contra. In *Morris v. Miller*, 4 Burr. 2057, the decision of the Court proceeded on the ground that in an action of adultery a person cannot make evidence on his own behalf, and in referring to bigamy it is broadly stated that mere admissions of marriage cannot prevail. In *Regina v. Newton*, 2 M. & Rob. 503, S. C., *Regina v. Simmonsto*, 1 C. & K. 164, it was held by the full Court that the prisoner's admission of a prior marriage was sufficient evidence of its being lawfully solemnized. In *Regina v. Savage*, 13 Cox C. C. 178, the Judge at the trial refused to follow *Regina v. Newton*, and held that such admission was not sufficient. In this case, however, the question was as to proof of the Scotch law. In *Regina v. Flaherty*, 2 C. & K. 782, the circumstances were different. Moreover, in all the cases cited the admissions were merely parol admissions. Here the admission

has the additional weight of being under seal. In *Regina v. Baby*, 12 U. C. R. 346, 353, it is laid down that on a case reserved everything must be taken most strongly against the prisoner. The Lower Canada decisions are expressly in favour of the admission. In the latter case, *Regina v. Creamer*, 10 Lower Can. 404, the case of *Regina v. Flaherty*, 2 C. & K. 782, was cited, but the Court refused to follow it. See also *Russell* on Crimes, 5th ed., vol. iii., p. 315.

December 7, 1878. WILSON, C. J.—It is impossible to read this evidence without coming to the conclusion that there was not sufficient evidence of a previous marriage to Sarah Duff. It all rests upon the prisoner's own declarations that he had a wife in England before the second marriage, and he had left her. At the time he said so he and the second wife could not agree, and he said that the money which bought the place belonged to his first wife, and he wanted it to go to the right one; and upon that he made a conveyance of the property to a trustee for the first wife and child in the old country, with a power of revocation. The trustee has collected a few dollars, but he has paid nothing of it to the alleged or supposed *cestui que trust*, nor has he communicated with her. The effect of the prisoner's declaration was to prevent the second wife, as she is called, from having or making any claim upon him; and the effect of the conveyance and power of revocation were to prevent the first wife, as she is called, from getting any benefit from the trust whenever it suited him to deprive her of it.

The prisoner had therefore a plain and direct purpose to serve in making the declaration, that he had before the marriage to Amelia Mitchell been married to another woman in England. There is no kind of proof but his mere word, which was apparently uttered for the bad purpose before stated, of the circumstances required to establish the charge of bigamy.

His confession of guilt made of this supposed felony committed by him, without proof that there was ever such

a woman as Sarah Duff, the alleged first wife, or that he was ever married to her, or that she was alive at the time of the marriage to Amelia Mitchell, the alleged second wife, and made also to answer some special purpose of his own which he thought his confession would accomplish, do not constitute, in my opinion, sufficient evidence of the marriage of the prisoner to Sarah Duff, the alleged wife.

The cases of *Regina v. Newton*, 2 M. & Rob. 503, S. C., by the name of *Regina v. Simmonsto*, 1 C. & K. 164, and *Regina v. Flaherty*, 2 C. & K. 782, do not by any means support the conviction in this case. The declarations of the prisoner were admissible against him, but by themselves they were not sufficient evidence of the alleged prior marriage.

I have not referred to the evidence of Amelia Mitchell, the alleged second wife, because if a first marriage were not proved her evidence was not admissible to prove her own marriage.

I am therefore of opinion that as the prisoner has been convicted upon the said indictment, and judgment has been thereon given upon the said conviction, that the said judgment be reversed, and that an entry be made upon the record that in the judgment of the justices of this Court the prisoner, who has been convicted, ought not to have been convicted, and that the said prisoner be discharged from the custody of the sheriff and keeper of the gaol of the County of Wentworth, in whose custody he now is upon the said conviction and judgment.

GWYNNE, J.—The question submitted to us is whether or not the evidence of a first marriage by the prisoner was sufficient to warrant his conviction upon a charge of bigamy, and my opinion is that it was not.

The deed executed by the prisoner after he had quarrelled with the woman to whom he was lawfully married, if he had not another wife living at the time in which he professed to provide for a woman as his wife, whom, as he alleged, he had left many years ago in England, reserving to himself a power of revocation, is quite consistent with the fact that

the deed was executed to endeavour to defeat the woman to whom he was married of the alimony which she was seeking, and with the fact that there never had in truth been such a person as the woman referred to in the deed as his first wife.

The prisoner's admission therefore of having been formerly married cannot be said to be an admission against his interest.

The recent cases in England have held the evidence to be insufficient.

GALT, J., concurred.

Conviction quashed.

RE NIAGARA ELECTION CASE—PLUMB V. HUGHES.

Dominion election petitions—Jurisdiction of Provincial Courts to entertain—Procedure—37 Vic. ch. 10, D.—Ultra vires.

Held, that the 37 Vic. ch. 10, D., by which the trial of controverted elections to the House of Commons was referred to the Court of Common Pleas, or any Judges thereof, amongst the other Courts named in this Province, was not *ultra vires* of the Dominion Parliament; and a preliminary objection raising this question was disallowed with costs.

Held, also, WILSON, C. J., dissenting, that the Dominion Parliament had power to enact the procedure to govern the Courts in relation to such trials, and that the Act 37 Vic. ch. 10, D., in this respect also was not *ultra vires*. A preliminary objection raising this question was therefore in like manner disallowed.

Per WILSON, C. J., that there was no power to enact such procedure, and that the Court not having any procedure of its own applicable, the petition should be removed from the files.

Seemle, per WILSON, C. J., that under R. S. O. ch. 49, sec. 45, the Court might have framed rules adopting the procedure in question, which if done might be applicable to future petitions; and that the Provincial Legislature could adopt such procedure, as if it had been originally enacted by such Legislature, or established by the Courts under their inherent or statutory jurisdiction.

Seemle, per GWYNNE, J., that the questions raised were not the proper subject of preliminary objections.

To a petition against the return of the respondent as a member of the House of Commons, the following preliminary objections were filed :—

1. That the election complained of in the petition of the said Josiah Burr Plumb is the election of a member of the House of Commons of Canada, held under the authority of a law of the Parliament of Canada known as "The Dominion Elections Act, 1874," and passed by the said Parliament of Canada in the thirty-seventh year of the reign of Her Majesty Queen Victoria, and chaptered 9.

2. That by another Act known as "The Dominion Controverted Elections Act, 1874," the Parliament of Canada pretended to confer upon this honourable Court, being a Superior Court under the legislative authority of the Legislature of the Province of Ontario, the same powers, jurisdiction, and authority with reference to an election petition affecting the election of a member of the House

of Commons of Canada, and the proceedings thereon, as if such petition were an ordinary cause within its jurisdiction.

3. That the constitution, maintenance, and organization of this honourable Court as a Court of civil and criminal jurisdiction is exclusively within the legislative authority of the Legislature of the Province of Ontario, and the Parliament of Canada has no legislative authority to confer a jurisdiction in any matters not possessed by this honourable Court prior to the passing of or authorized by the provisions of the British North America Act, 1867.

4. That prior to the passing of the British North America Act, 1867, this honourable Court had no jurisdiction to adjudicate upon election petitions or elections of members of the said House of Commons, or of any of the Legislative Bodies which preceded the said House of Commons of Canada.

5. That the establishment of Courts for the administration of the laws of Canada is exclusively within the legislative authority of the said Parliament of Canada.

6. Wherefore the said respondent, as a preliminary objection and before he can be compelled to answer the said election petition, objects and demurs to the jurisdiction of this honourable Court in respect of the matters of the said election petition, and submits that this honourable Court is and can be invested with no judicial powers but those conferred by the legislative authority which constitutes it, and those which the Parliament of Canada has legislative authority to confer upon it, pursuant to the provisions of the said British North America Act, 1867; and that the clauses in the said Dominion Controverted Elections Act, 1874, conferring or pretending to confer upon this honourable Court the said powers, jurisdiction, and authority, or any judicial powers affecting elections to the Parliament of Canada, and the said election petition of the said petitioner, Josiah Burr Plumb, are *ultra vires* the legislative authority of the said Parliament of Canada. Wherefore the respondent prays the judgment of this honourable Court on the above preliminary objections.

On motion of the petitioner, the objections were set down for argument.

In this term, November 23, 1878, the objections were argued.

Hodgins, Q. C., for the respondent. The first question raised by the preliminary objections is, whether the Dominion Parliament can vest a new jurisdiction affecting, not a matter of ordinary jurisprudence, but the privileges of Parliament, in the Provincial Courts of Ontario, which owe their existence and jurisdiction to the Provincial Legislature, and over which Legislature the Dominion Parliament has no legislative authority.

The question arises from the dual legislative sovereignty created by the British North America Act in the Dominion and Provincial Legislatures, with separate forms of governments, formerly possessed by one. By the British North America Act each has exclusive authority over the classes of subjects referred to respectively in the 91st and 92nd sections, and as separate governments of enumerated, and therefore limited, powers, neither can encroach upon the sovereignty or exclusive legislative powers of the other; and the Courts are bound to prevent such encroachments: *Regina v. Lawrence*, 43 U. C. R. 174.

Each government has the power to tax, but it has been held that the Provincial power of taxation does not include the right to tax Dominion officers: *Leprohon v. Corporation of Ottawa*, 2 App. 522. Referring further to the enumerated powers, it may be noticed that the Provincial Legislature alone can constitute municipal bodies with police powers; and that the Federal Legislature has exclusive control over the sea coast and fisheries, and ferries between two Provinces, and between a Province and a foreign country, and over navigation and shipping, all of which are outside of Provincial jurisdiction; but if the argument of the other side is correct, the Federal Parliament can vest in these local municipal bodies a jurisdiction to pass by-laws providing health and police regulations in places where the Provincial authority is excluded—giving to the created

bodies of the Provincial Legislature, extra-provincial jurisdiction. Prior to confederation, the Legislative Assembly of Canada had judicial powers in election cases and regulated its own procedure. That jurisdiction was not exercised as part of its legislative functions, but as one peculiarly affecting the privileges of Parliament, which had, in early days, been claimed as against the Crown and the Courts, and finally conceded to the House of Commons, as part of its inherent and undoubted privileges: *Glanville's Election cases*, lxxxv: 60; *Théberge v. Laudry*, L. R. 2 App. 102. By the 41st and 84th secs. of the British North America Act, the Election Committees of the Federal and Provincial Legislatures were clothed with the judicial powers over elections possessed by the election committees of the former Legislature. But the committees of the House of Commons acquired no jurisdiction over elections to the Local Legislature; nor committees of the Local House jurisdiction over elections to the Commons. It could not be argued that the Parliament could vest in the Local Legislature, nor the Local Legislature in the Parliament, any jurisdiction to try the validity of their respective elections; nor could such jurisdiction be conferred upon their respective election committees, which were the creations of the legislative will. Provincial Courts are also the creations of the Legislature of the Province; and if this new jurisdiction as to elections could not be vested in the Local Legislature or in its committees, neither can it be vested in its Courts. The 91st and 92nd secs. of the British North America Act do not refer to elections; and the argument as to that peculiar subject of jurisdiction does not depend upon the construction to be given to those sections. There is no power given to the Dominion by sec. 91 to establish Courts, which would derogate from the exclusive sovereignty of the Province to constitute Provincial Courts and define their jurisdiction. The Dominion by that section is excluded from constituting criminal courts; but by sec. 101 appellate functions as a Criminal Court, may be given to the Supreme Court. The Local Legislature under sec. 92,

has exclusive power to make laws respecting the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and can determine what Courts shall be appellate or original, superior or inferior, and the causes and territories over which they shall have jurisdiction. The Federal Legislature, under sec. 101, may constitute a general Court of Appeal, and establish any additional Courts for Canada. But if the Federal Legislature can use the Courts of the Local Legislature in the manner provided by this Election Act; so may the Local Legislature vest jurisdiction in the Federal Courts, and may give the Appellate Courts original provincial jurisdiction, and vest criminal jurisdiction in such other Federal Courts as it may select. This interference with the Courts of the other Government, may go further. If the Federal Legislature can so use the Provincial Courts, it may do so irrespective of the statutory powers or functions, or territorial jurisdiction, of such Courts. It may, as is attempted in this Act, give original jurisdiction to the Court of Appeal, or may give appellate jurisdiction to a Court of original jurisdiction, civil jurisdiction to a criminal Court, superior jurisdiction to an inferior Court; it may extend the territorial jurisdiction of an inferior Court over the Province, or two Provinces, or the unorganized territories of the Dominion; or it may make one Provincial Court the Election, Exchequer, Divorce, Maritime, and Militia Court for the Dominion, and so crowd the Courts as to make them nugatory for Provincial purposes, and thus interfere with the created work of a sovereign Province in a way it could not interfere with its Legislature. The Provincial Courts now exercise jurisdiction over matters within the federal powers, as insolvency, customs, excise, and naturalization, not by grant from the Parliament of Canada, but because they possessed that jurisdiction prior to confederation, and the British North America Act has continued it in them. The Controverted Elections Act of 1873, recognized the exclusive authority of the Province over the Courts. It empowered the Judges, not the Courts,

to try election cases, but made it a condition that the Judges should not exercise the jurisdiction until the local Government authorized them ; and the Ontario Legislature passed an Act, 37 Vic. ch. 7, sec. 15, to confer the requisite authority. But this Act ignores the principle of the Act of 1873, and declares that the Provincial Courts shall, as regards Dominion elections, have the same powers, jurisdiction, and authority over them as if they were ordinary causes within their jurisdiction, a power which could not be conferred upon the Legislature to which the Courts owe their existence. The 101st section of the British North America Act empowers the Federal Parliament to establish Courts. A similar authority is vested in the Congress of the United States : "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress shall from time to time establish." The value of American decisions as to the legislative authority of a dual sovereignty like ours was approved in the Court of Appeal in *Leprohon v. Corporation of Ottawa*, 2 App. 529, 532, 546. In the United States, which possesses a system of dual government like ours, the Federal and State Courts, since 1812, have held that Congress cannot vest jurisdiction in a State Court. "Congress cannot vest any portion of the judicial power except in Courts ordained and established by itself. It is only where, previous to the constitution, State tribunals possessed jurisdiction independent of national authority, that they can now exercise a concurrent jurisdiction" : *Martin v. Hunter*, 1 Wheat. 303, 310; *Houston v. Moore*, 5 Wheat. 1, 27, 67; *Ely v. Peck*, 7 Conn. 239, 242; *United States v. Hudson*, 7 Cranch 32; *The Wave*, Blatch. & Howl. 235, 252; *United States v. Lathrop*, 17 Johns. 4; Story on the Constitution, 4th ed., vol. ii. secs. 1754-5. Nor can a State Legislature vest judicial power in, nor determine the jurisdiction of, the Federal Courts, nor the jurisprudence they shall administer : *United States v. Peters*, 5 Cranch 115; *Clark v. Smith*, 13 Peters 195, 202; *The Chusan*, 2 Story R. 455; *Bump's Notes of Constitutional Decisions*, 261-273. A Federal Court cannot enjoin proceedings in a State Court :

Diggs v. Wolcott, 4 Cranch 178. Nor can a State Court enjoin proceedings in a Federal Court: *McKim v. Voorhies*, 7 Cranch 278. Nor can a Federal Court remove from a State Court a case within the competency of the State Court: *Wetherbee v. Johnson*, 14 Mass. 412. The judiciary of one separate and distinct sovereignty cannot itself assume, nor can another separate and distinct sovereignty authorize or coerce it to exercise, the judicial powers of such other separate and distinct sovereignty: *Jackson v. Rose*, 2 Virg. Cas. 34. He also referred to *Rhode Island v. Massachusetts*, 12 Peters 23; *Ableman v. Booth*, 21 Howard U.S. 506, 514; *McLean v. Lafayette Bank*, 3 McLean 185; *Cushing's Law and Practice of Legislative Assemblies*, secs. 154, 556, 703, 719; *Re Arbitration Ontario and Quebec*, 6 C. L. J. N. S. 212; *Petition of Right Act*, 38 Vic. ch. 12, sec. 17, D.; *Slavin and Corporation of Orillia*, 36 U. C. R. 159, 167, 175; *Regina v. Taylor*, 36 U. C. R. 183; *Leprohon v. Corporation of Ottawa*, 40 U. C. R. 487, 493; *Ulrich v. National Ins. Co.*, 42 U. C. R. 155; *Re Goodhue*, 19 Grant 366; *L'Union St. Jacques De Montreal v. Belisle*, L. R. 6 P. C. 31; *Dow v. Black*, L. R. 6 P. C. 272.

The next objection is, that even if this federal jurisdiction is legally vested in the Provincial Courts, the Parliament of Canada has exceeded its powers in prescribing a procedure for the Courts. The legislative authority to regulate procedure in civil matters in the Provincial Courts, is exclusively vested in the Local Legislature. The Dominion Parliament can only legislate on the subject for the Provincial Courts, under sec. 94 of the British North America Act, and by that section, no Act of the Parliament of Canada can have force or effect in any Province unless and until it is enacted as law by the Legislature thereof; and there is another condition in sec. 97. The Election Act under consideration directs how proceedings are to be instituted, how the parties are to be examined, the times for pleading, and that the trial shall be without a jury, and its provisions have not been enacted as law by the Provincial Legislature. Trial without a jury in crimi-

nal cases relates to procedure in criminal matters, and not to the constitution of the Court: *Regina v. Bradshaw*, 38 U. C. R. 568. And if the Parliament of Canada can prescribe procedure in these election cases, it may prescribe a different procedure for the different classes of subjects within its legislative authority, and so override the express provisions of the British North America Act. If it has a right to prescribe any rule, it has a right to prescribe all rules, and to limit and control procedure in all the Provincial Courts. This being a case in which the validity of an Act of the Parliament of Canada has been brought in question, the Court has power to refer the case to the Supreme Court for decision under R. S. O. ch. 37, sec. 1, subsec. 3, and the Supreme Court Act, 38 Vic. ch. 11, sec. 54, D., as amended by 39 Vic. ch. 26, sec. 17, D.

Robinson, Q. C., and *Henry O'Brien*, for the petitioner. There is no question but that the House of Commons, both by the British North America Act and the inherent right of Parliament, have the right and power to try election petitions: *Cushing* on the Law and Practice of Legislative Assemblies, 54; and having it, they may delegate it as they have done. Assuming even that the Court or Judge could not be compelled to act, there is nothing to prevent the Dominion Parliament requesting them to examine into and report to the House of Commons upon the evidence brought before them, and if that house, of which the respondent claims to be a member, should act upon such report, the respondent could not effectually object. There might be no means of enforcing his presence at the trial, but he would absent himself at his peril, and would have to trust to what the House might do on the receipt of the report. The statute, however, does constitute this a Court, under the British North America Act, for the trial of these petitions. By that section the Parliament of Canada, in addition to the establishment of a Supreme Court, may provide for the establishment of any additional Courts for the better administration of the laws of Canada, and they have exercised this power. The Act of 1873, 36

Vic. ch. 28, secs. 2-7, constituted the Judges, to be chosen as directed, a Court for the trial of election petitions under the name of the Election Court. This was clearly constituting a new Court. Sec. 7 shews that the Dominion Legislature in no way acknowledged the exclusive jurisdiction of the Local Legislature over these Courts as has been contended on the other side. The Act merely requires that the Lieutenant-Governor in Council should require the Judges to act. The respondent admits that but for the repeal of this Act there would be power to try these petitions. By the Act of 1874, 37 Vic. ch. 10, D., it is provided that the Courts named, "or any Judges thereof," should constitute the Courts for the trial of election petitions. This is substantially the same as the former Act; the Judges of the several Courts are constituted election Courts for the trial of election petitions; and this contention is borne out by the various sections of the Act. Sec. 44 says the Judges of the several Courts may make rules, &c. Sec. 48 says, on the trial of an election petition the Judge shall have the same powers as a Judge of the Superior Court; and sec. 67 says that persons allowed to practise as barristers and attorneys before the Superior Courts may practise on such petitions before such Court or Judge. If it was intended merely to submit the trial of petitions to existing Courts there would have been no object in these provisions. Secs. 45, 46, 47, also bear out this contention. It is clear that new Courts were established as Election Courts, having the same powers as Superior Courts. The same scheme is carried out by 37 Vic. ch. 9, sec. 10, D. The exclusive authority of the Provincial Parliament to enact procedure in civil matters under sec. 92, No. 14, of the British North America Act, refers only to those matters over which that Legislature has exclusive control. But where the matter is one assigned exclusively to the Dominion Parliament, the procedure required to carry out their enactments must necessarily be within their powers. It would be useless to authorize them to legislate upon any subject in the abstract, and to withhold from

them the authority to create the procedure essential to make such legislation effectual. Thus the Insolvency Act, and many other matters are assigned to the Dominion, and a procedure has been enacted by that Parliament. So also in the Customs Act, 31 Vic. ch. 6, secs. 99, 104, 121, 122, and the Revenue Act, 31 Vic. ch. 8, sec. 155, 156, the Provincial Courts are made use of, and a procedure enacted; and these Acts have never been questioned. As to the argument that these powers were possessed before confederation, there was no Insolvency Act in Nova Scotia or New Brunswick before confederation. See *Cooley* on Constitutional Limitations, 3rd ed., secs. 67, 68; 4th ed., 77; *Crombie v. Jackson*, 34 U. C. R. 575; *Maxwell* on Statutes, 105-110. As to the argument founded on the similarity of the constitution of the United States, in some important respects, as has been often pointed out, that constitution differs from our own. The reserved powers there are with the States, here they are with the Dominion. Here the Dominion appoints the Judges of the Provincial Courts, while there they are appointed by the several States.

RE SOUTH ONTARIO ELECTION CASE—MCKAY V. GLEN.
 RE WEST HASTINGS ELECTION CASE—WALBRIDGE V.
 BROWN.

In these cases there were the same preliminary objections, and the arguments were substantially the same as in the above case.

J. D. Edgar, and *Bethune*, Q. C., appeared respectively for the respondents.

Hector Cameron, Q. C., and *Hector Cameron*, Q. C., and *G. R. Howard*, respectively, for the petitioners.

They referred to *Montreal Centre Election Case*, *Ryan v. Devlin*, 20 L. C. Jur. 77; *Argenteuil Election Case*, *Owens*

v. *Cushing*, 20 L. C. Jur. 86, as being express decisions on the statute in question, shewing that there was jurisdiction to entertain the petitions.

December 11, 1878. GALT, J.—By the 41st sec. of the British North America Act, 1867, it is enacted “Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union, relative,” among other things, to “the trial of controverted elections and proceedings incident thereto” shall respectively apply to the election of members to serve in the House of Commons for the same several provinces.

It is manifest that future legislation on the subjects mentioned in that section was contemplated, and such legislation was vested solely in the Parliament of Canada.

By sub-secs. 13 & 14 of sec. 92, the Provincial Legislature of each Province has exclusive jurisdiction in relation to property and civil rights in the Province, and in relation to the administration of justice in the Province, including the constitution, maintenance, and organization of *provincial* Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

It is upon these sub-sections the argument in the present case has been founded, the contention being that the mode of trying a controverted election is procedure in a civil matter, and consequently is vested exclusively in the Provincial Legislature.

If there had been no other provision bearing on this subject this proposition might have been entitled to great weight; but by the 101st section “The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide * * for the establishment of any additional Courts for the better administration of the laws of Canada.”

At the time when the Act was passed there was no law of Canada providing for the trial of controverted elections, as appears from the 41st section above referred to. The Parliament of Canada has since passed such a law, and had under the above clause express authority to provide a Court

for the administration of such law, notwithstanding any thing in the Act.

By that Act an Election Court has been constituted for the purpose of administering that law in the respective Provinces, and the Court of Common Pleas has, among others, been named as forming the Election Court in Ontario.

I confess I am unable, notwithstanding the learned and able arguments of Mr. Hodgins and Mr. Edgar to the contrary, to suggest even a doubt as to their power so to do.

I therefore think these preliminary objections should be disallowed, with costs.

GWYNNE, J.—The Dominion Act, 37 Vic. ch. 10, was passed, as its preamble states, “to make better provision for the trial of election petitions, and the decision of matters connected with controverted elections of members of the House of Commons of Canada.”

By the 7th section of that Act it was enacted that any person who had a right to vote at the election, or who was a candidate at it, might present a petition complaining of an undue return or undue election of a member, provided always that nothing therein contained should prevent the sitting member from objecting, under sec. 10 of the Act, to any further proceedings on the petition by reason of the ineligibility or disqualification of the petitioner.

The 10th section here referred to enacts that within five days after the service of the petition “the respondent may present in writing any preliminary objections or grounds of insufficiency which he may have to urge against the petition or the petitioner, or against any further proceedings thereon, and shall, in such case, at the same time file a copy thereof for the petitioner;” and that “the Court, or any Judge thereof, shall hear the parties upon such objections and grounds, and shall decide the same in a summary manner.”

In virtue of the provisions contained in this Act, the above petitions have been filed, complaining respectively of

the undue election and return of the gentlemen who have been returned as members of the House of Commons for the several counties named in the said petitions. The respective respondents named in the petitions have also, availing themselves of the provisions contained in the said 10th section, filed preliminary objections to the petitions being further proceeded with, upon the ground that, as they contend, the above statute was *ultra vires*: that the Dominion Parliament had no power to pass it: that its provisions therefore are void; and that we have no power to entertain the petition, to try the matters sought to be presented thereby for trial, and to adjudicate thereon.

This contention seems to me to raise a singular question, not the least singular element in which seems to be that the learned counsel for the respondent rests his argument upon a foundation which it cannot be denied is indisputable, namely, that the subject matter brought into contestation by these petitions respectively is a matter over which the Local Legislature has not, nor ever could have, any jurisdiction whatever—a matter in fact which in virtue of a principle inherent in the British constitution, of which that of the Dominion of Canada is the image and transcript, was cognizable as matter of exclusive privilege in the House of Commons alone.

If the Act of Parliament, in virtue of which these petitions have been filed, be, as is contended, *ultra vires*, the respondent had no right to file these preliminary objections, or to invoke our jurisdiction to hear the argument which has been addressed to us, for the objection taken goes to our right to hear as well as to our right to determine.

The consequence of our refusing to assume the jurisdiction, which the Act purports to vest in us, will be to defeat the laudable intention of the House of Commons to divest itself of its exclusive constitutional privilege, and to transfer the power of adjudicating upon the matter from a political to a judicial tribunal.

If there were any doubt as to our right to exercise the jurisdiction which the Act purports to transfer to us, I

think our proper course would be, in view of the gravity of the consequences attending our refusing to act, to assume the jurisdiction, and to leave the respondents to raise the question, either in Parliament or elsewhere, as they may be advised; but I confess I entertain no doubt whatever as to our right.

Several decisions of the Courts of the United States have been cited to us; but these being based upon the constitution of the several States of the Union and of the Federal Government, and upon the constitutional relation which they bear to each other, can afford little assistance upon matters arising under our constitution, which, though of a federal nature, is totally different from that of the United States.

In one of the cases cited to us by Mr. Hodgins, namely *United States v. Hudson*, 7 Cranch 32, it is said, at p. 33, that "The powers of the general government are made up of concessions of the several States—whatever is not expressly given to the former, the latter expressly reserve."

With us the very opposite of this is the case. The Dominion Government and the several Provincial Governments emanate from the one Sovereign Power, the Imperial Parliament. The Provincial Legislatures have no jurisdiction whatever but what is expressly conferred upon them by the statute which calls them into existence, whereas by that same statute upon the Dominion Parliament is conferred the power of making laws not merely in respect of the particular subjects enumerated, but in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces; and the privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons are declared to be in effect those which at the time of the passing of the British North America Act were held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

The proper expression of the relation of the Dominion and Provincial authorities to each other, seems to be this, that

the Imperial or Sovereign power has created several governments, one of which is made superior, to which all the others are subordinate, carved, as it were, out of the superior one; and has conferred upon the several subordinates certain municipal powers in relation to certain matters specifically enumerated, reserving to the superior, which it has designated the Dominion Government, (so long as the Imperial Act remains unrepealed), all those powers which are necessary to be enjoyed for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned by the Act exclusively to the Provincial Legislature; and consistently with this subordination of the Provincial to the Dominion Government, the laws of the Provincial Legislatures only obtain their validity by the assent of the Dominion Government.

It is obvious that a confederation so constituted bears no resemblance whatever to the confederation of States of the American Union.

Decisions therefore of the United States Courts upon questions arising out of the relation of the several States of the Union to each other, and to the Federal Government, can be of little assistance to us upon the question before us, which is one relating simply to the construction of an Act of Parliament.

Now it is part of the case of the respondents that the Provincial Legislature of Ontario has no jurisdiction whatever over the subject matter of these petitions, namely the right of the respondents respectively to sit in the House of Commons. That such a right is a civil right can not be doubted. Here, then, as is conceded, is a civil right over which the Provincial Legislature has no claim of jurisdiction whatever, notwithstanding that, among the subjects exclusive control over which is conferred upon the Provincial Legislatures we find enumerated, "Property and civil rights in the Province." This then is a right which coming within the description of "matters not coming within the classes of subjects assigned exclusively to the Legisla-

tures of the Provinces," is under the jurisdiction of the Dominion Parliament in virtue of the very terms of the British North America Act.

But it is further part of the case and contention of the respondents, that wholly irrespective of the above provision extracted from the Act, this is a right which, in virtue of a principle inherent in the constitution, was cognizable only by the House of Commons in the exercise of its exclusive control over the privileges of the House.

The subject matter then, being as well in virtue of a principle inherent in the constitution of the Dominion as by the express provisions of the British North America Act, vested in the Dominion Parliament, it must be competent for that Parliament to transfer the jurisdiction over this peculiar right to any Court having capacity to take cognizance of the matter, and it seems to me that the Dominion Parliament alone having control over the subject matter, and power to divest the House of Commons of its jurisdiction, the question really is not of encroachment upon the privileges of the Local Legislature, who have no control whatever over the subject matter, but whether there is anything in the constitution of the Courts to which cognizance of the matter is professed to be transferred which incapacitates them from accepting and assuming it, and, if there be, whether it was competent for the Dominion Parliament to remove such incapacity, if any there be.

The Superior Courts of common law which were in existence in Upper Canada at the time of the passing of the British North America Act, were invested with the like powers, rights, and incidents in every respect as Courts of original jurisdiction within Upper Canada as were enjoyed and possessed by the Superior Courts of common law at Westminster. If an Act had been passed by the old Parliament of Canada merely extinguishing the jurisdiction of the Commons House of Assembly over the election of members of that House, without naming any Court to which the jurisdiction should be transferred, but declaring that any Court of competent jurisdiction might entertain and dispose

of the matter upon the complaint of any person aggrieved, there can be no doubt that the Superior Courts of common law could have assumed the jurisdiction in virtue of the rights, powers, and incidents inherent in them as Courts of original jurisdiction by the Acts of Parliament by which they were established, and would have provided a remedy suitable to the occasion ; but by the provisions of the 129th section of the British North America Act these Courts have still the same existence with all the rights, powers, and incidents that they had before the union, as if the union had never been made, subject to the same being repealed, abolished, or altered by the Parliament of Canada or by the Legislatures of the respective Provinces according to the authority of Parliament, or of the Local Legislatures under the Act.

The Superior Courts of common law jurisdiction have not since the union been deprived of any of the rights, powers, and incidents which as Courts of original jurisdiction they had before the union. Among these incidents they retain, therefore, the same capacity to accept and assume jurisdiction over the members of the House of Commons, which is the successor of the old House of Assembly of Canada, as they had before the Union to assume jurisdiction over the members of that House of Assembly. If therefore the Dominion Parliament had passed an Act of similar nature with that suggested in the case put of the old Parliament of Canada, in like manner and terms, surrendering the jurisdiction of the House of Commons over its members without naming any Court to which cognizance of the matter should be transferred, the Superior Courts of common law would have the same right to assume cognizance over the subject matter precisely to the same extent as they had to assume it over the members of the House of Assembly of Canada before the Union, upon the passing of the Act extinguishing the jurisdiction of that House over its members ; and this capacity exists as a right inherent in the courts from the nature of their institution as originally established.

These Courts then having the right and power to assume the jurisdiction, if so abandoned by the House of Commons and extinguished by an Act of the Dominion Parliament, and the Dominion Parliament having exclusive jurisdiction over the subject matter, it was clearly competent for that Parliament to pass an Act transferring the jurisdiction to this Court, and as incident to that power it was equally competent for Parliament to annex conditions to the transfer prescribing the practice and procedure to be pursued. If no such rules should be prescribed, it would devolve upon the Courts, and not upon the Provincial Legislature, to adopt such practice and procedure as they should deem suitable to the occasion, either by analogy derived from the common law, or from the practice and procedure in relation to similar jurisdiction affecting the election of members of the local House vested in them by an Act of the Local Legislature.

But if these Courts had been constituted since Confederation with superior common law jurisdiction over all matters affecting "property and civil rights in the province," such new Courts would, in my opinion, equally with the old continued Courts, have the same capacity necessarily inherent in them from the nature of their institution.

This, however, is not a question before us; for this Court having had its existence prior to the Union, and no Act having been since passed stripping it of any of its ancient rights and privileges, possesses all the powers and incidents as a Court of original jurisdiction which it has had ever since it was first constituted, in as ample a manner as it ever had, and among these the right to accept the jurisdiction professed to be transferred to it by the Act of Parliament, the validity of which has been called in question.

It was argued by Mr. Hodgins that if the Dominion Parliament has the power thus to increase the business of the Courts, they might as well assume the power of conferring criminal jurisdiction upon the Court of Chancery, or of conferring civil jurisdiction upon a Court constituted as a Criminal Court only, and further that they might render

the Courts practically incapable of transacting efficiently the ordinary business arising therein, and that thus the Dominion Parliament would be interfering with the constitution, maintenance, and organization of the Courts.

I fail, I confess, to see any analogy between the case of the Dominion Parliament assuming, in disregard of the express provisions of the British North America Act, to confer criminal jurisdiction upon a Court constituted as a Court of civil jurisdiction only, and the case of Parliament transferring cognizance over a peculiar civil right, formerly exercised by the House of Commons alone, to the ordinary tribunals having original jurisdiction in civil matters, to be exercised by them, just as they might and would have exercised it but for the exclusive jurisdiction formerly exercised by the House.

As to the apprehension that if this Act of Parliament be held to be valid, the Dominion Parliament may flood the Courts with business in respect of other matters in which the Local Legislature is not interested, to the prejudice of the exercise by the Courts of the jurisdiction over matters ordinarily arising therein, I fail to see how the maintaining the validity of this Act of Parliament can justly give rise to the apprehension of any such evil. If, however, the evil apprehended should ever arise, I have no doubt that the parties interested will be able to devise a remedy. However, I am unable to perceive with what reason the non-existence of a power can be fairly concluded from a suggestion of the possible abuse of it.

Much was said about the constitution, maintenance, and organization of our Courts being exclusively under the control of the Provincial Legislature, including procedure in civil matters in those Courts.

These latter words, in the 14th paragraph of the 92nd section of the British North America Act, plainly apply, as it appears to me, to the procedure in those civil matters over which the preceding paragraph, the 13th, gave to the Provincial Legislature exclusive control, namely, "property and civil rights in the Province," and do not affect procedure

in the case before us, which being a matter over which the Provincial Legislature has no jurisdiction, it could not assume to prescribe a procedure relating thereto; but the perfect accuracy of the proposition that the constitution and organization of our Courts are exclusively under the jurisdiction of the Provincial Legislature, although the determination of the point before us does not require its discussion, may, as it appears to me, well be questioned.

The constitution of the old Courts in existence at the time of Confederation cannot be abolished or altered without the assent of the Dominion Government to the Act passed for the purpose by the Provincial Legislature. No new Courts can be constituted, or when constituted, be abolished or altered without the like assent.

No doubt the right to constitute and organize Courts of Justice is by the British North America Act vested in the Provincial Legislature, except in so far as participation in such organization is by the same Act reserved to the Dominion authorities.

Now, as it seems to me, Courts for the administration of Justice would be very imperfectly organized without Judges. They form a very important constituent in the organization of Courts, and, until their appointment, it cannot be said with accuracy that the Courts are completely constituted and organized. As the appointment then of the Judges rests with the Dominion Government, and the power to remove them is vested in the Dominion Parliament, and as no alteration in their constitution can be effected without the assent of the Dominion Government to the Act of the Provincial Legislature passed for the purpose, it would be more consistent with the frame of our constitution, as it appears to me, to speak of all newly created Courts as being constituted and organized by the united action of the Dominion and Provincial authorities; and the Judges of such Courts, as well as the Judges of the old Courts whose existence until abolished or altered has been continued as if the union had not been made, may with perfect propriety be deemed to be officers of the Dominion Government, and may well be deemed subject to having duties imposed upon

them by the Dominion Parliament of a judicial character in respect of matters over which that Parliament has control, of like nature with those matters which by the nature and constitution of the Courts of which they are Judges, are within the scope of their general jurisdiction.

Mr. Robinson, in one branch of his argument contended that the object and intent of the Act was, under the designation and expression "The Court," to erect and constitute in each Province of the Dominion a Court or Courts for the trial of election petitions and the decision of matters connected with controverted elections of members of the House of Commons of Canada, which Courts, although composed of the same persons who are Judges of the several Courts of Superior Jurisdiction named in the Act, constitute for the trial of election petitions and the decision of matters connected therewith distinct Courts from those of ordinary superior jurisdiction: that the definition given of the expression "The Court," as respects elections in the several Provinces respectively, as meaning the Courts thereafter mentioned "*or any Judges thereof*" shews the intent of the Act to be that any Judges of the Superior Courts named, when sitting to hear and determine any matter arising out of an election petition, shall be "The Court" constituted by the Act for that purpose. Mr. O'Brien also pointed out several sections of the Act seeming to favour this construction, especially the 48th and 67th, in the latter of which the expression "The Court," is brought into direct contrast with "Superior Courts" in that it is declared there that persons entitled to practise as attorneys and counsel before the Superior Courts of the Province may practise as such also before "the Court or Judge in such Province," a provision quite unnecessary if the proceeding upon election petitions was by the Act made to be a proceeding in the Superior Courts of which such counsel and attorneys were already authorized practitioners.

There is much, I confess, as it appears to me, in favour of this construction, although the language of the Act is by no means felicitous or free from ambiguity.

But whether or not this be the true construction of the Act is of no importance, in so far as the question before us is concerned, for I entertain no doubt that this Court and the Judges thereof have inherent in them power and capacity to accept the jurisdiction which the Dominion Parliament, as the sole power having jurisdiction over the particular right in question, has by the Act professed to transfer, whether cognizance of the matter is transferred to the Court of Common Pleas or to the Judges thereof, as Judges of a Court constituted by the Act for the trial of controverted elections.

I am also of opinion that the Dominion Parliament having the power to surrender upon behalf of the House of Commons, and to transfer that jurisdiction which the House of Commons formerly exercised, had also the power to annex conditions to such surrender and transfer; which is what has been done, when the Act says that subject to the provisions expressed in the Act as to procedure until rules shall be established as provided by the Act, and as to the status and condition of the persons competent to be complainants, the Court shall have the same powers, jurisdiction, and authority with reference to election petitions, as if said petitions were, what they are not, ordinary causes within their jurisdiction.

I am of opinion, further, that inasmuch as the Provincial Legislature never had any jurisdiction whatever over the subject matter, it cannot be said that the Dominion Act encroaches in the slightest degree upon the powers of the Provincial Legislature; nor has that Legislature any jurisdiction in my opinion to pass any Act prescribing or authorizing the course of procedure in this matter over which they have no jurisdiction.

And finally I am of opinion that the objections taken are not the proper subject of preliminary objections within the 10th section of the Act.

The same point has already been decided by the Court of Review in the Province of Quebec, in the *Montreal Centre Election Case, Ryan v. Devlin*, 20 L. C. Jur. 77; but I

thought it advisable nevertheless to state the reasons which have led my mind to the same conclusion.

In the several cases before us the objections must be disallowed, with costs to be paid by the respondents.

WILSON, C. J.—The question which has been raised in this case, impeaching the authority of the Dominion Parliament to refer the trial of their controverted elections to the Courts of this Province which are named in "The Dominion Controverted Elections Act, 1874," like all other questions of a constitutional nature, is one which must be carefully considered, as it lies at the root of all the proceedings which are or may be taken under the disputed jurisdiction. These proceedings affect directly the status of the party in some important respects, and they may affect his property and liberty, and in the enforcement of the process of execution they may bring the taking of human life into question.

The objections now raised are of great consequence and concern to every one.

They are in effect :

1. That the Dominion Parliament has made this Court a tribunal for the trial of these controverted elections while, as it is alleged, the Parliament had no power to confer such jurisdiction upon or to require this Court to entertain and to adjudicate upon such matters.

2. That if the Parliament could lawfully empower or require this Court to act in such matters, it had not the power to direct the Court to proceed by the process and in the manner provided for by that Act.

These are said to be valid objections :

1. Because the Legislature of this Province has by the British North America Act, 1867, sec. 92, power "exclusively to make laws in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say :"

Sub-sec. 14, "The administration of Justice in the Province, including the constitution, maintenance, and organiza-

tion of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts," while the Dominion Parliament has exclusive legislative authority, by sec. 91, sub-sec. 27, over "The criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters." But not in any manner any jurisdiction over those matters coming within "the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

2. Because by section 101 "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada"; and it ought to have created Courts for these election trials, but it has not done so.

3. Because by section 94, "Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces, and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act, shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof." And the Controverted Elections Act, although probably designed as one of uniformity in the different Provinces, has not been adopted and enacted as law by the Legislature of this Province, and the petitioner is proceeding as if the Legislature of Ontario had passed such an adopting statute.

4. Because, on general constitutional grounds, the Dominion Parliament has no power to vary the constitution

or jurisdiction of the Courts of this Province, or of the Judges thereof, either by assigning to them new and additional duties, or by conferring upon them new and additional powers, or by converting these Courts or the Judges thereof into a different Court, such as an Election Court, with different powers and duties from those which have been assigned to them by the Provincial Legislature, and with a different form of procedure from that which has been appointed to and for them by the Provincial Legislature.

I think I have fully stated the effect of the grounds of exception which were taken by Mr. Hodgins, in his very full and able argument for the respondent in this case.

It will be advisable to mention the course of legislation relating to these controverted election trials.

Before and at the time of the passing of the Dominion Act, these trials were conducted before a select committee of the House, under the Consol. Stat. C. ch. 7. The British North America Act, 1867, enacts, sec. 41, that "Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union, relative to the following matters or any of them, namely, *

* the trial of controverted elections, and proceedings incident thereto * * shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces."

In Ontario, by the 34 Vic. ch. 3, election petitions were to be filed in the Court of Queen's Bench, and that Court was "the Court" designated by that name for the purpose of that Act, and the petitions were to be tried by a Judge chosen from each of the Courts of Queen's Bench, Chancery and Common Pleas, without a jury, excepting matters of law, which were to be disposed of by the Court. The procedure was by petition to be delivered to the Clerk of the Court, the petitioner was to give security for costs, and the other proceedings were substantially of the like kind as were provided for afterwards by the Dominion Acts. It was the Judges on the rota who were to make and revoke or alter the rules which were authorized to be made.

That Act was amended by the 36 Vic. ch. 2, 29th March, 1873, but not in any way material to the present case.

The next enactment in point of time, was the Dominion Act, 36 Vic. ch. 28, 23rd May, 1873.

By that Act, sec. 2, the "Election Court" was for the purpose of that Act to "mean any three Judges, of whom, under the provisions hereinafter made, any one might try an election petition in the Province to which the enactment in which the expression occurs has reference, sitting specially either in term or in vacation for the purposes of this Act." And "the Election Court for the Dominion, or for the Province or place in which the election in question was held, as the case may be, shall always be understood as intended when 'The *Election Court*' is mentioned."

By sec. 5. When a general Court of Appeal for the Dominion was created one of the Judges of that Court might try an election petition, "and any three judges of the said Court sitting specially for the purposes of this Act, shall be *the Court* for hearing any appeal from the Judge trying an election petition, and shall be intended by the expression, '*The Election Court*,' whenever it occurs in this Act."

It is not necessary to refer to any of the other provisions of that Act, because it was repealed in the following year. The procedure under it was generally the same which was directed to be taken under the Ontario Act of 1871.

The 37 Vic. ch. 10, 26 May, 1874, repealed the Act of 1873, excepting as to matters then pending.

By sec. 3 of the Act of 1874, it is declared that "in this Act, and for the purposes thereof, the expression '*the Court*,' as respects elections in the several Provinces hereinafter mentioned respectively, shall mean the Courts hereinafter mentioned, or any Judges thereof."

2. In the Province of Ontario, any of the following Courts, viz. : The Court of Error and Appeal, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Chancery, and the Chancellor and Vice-Chancellors of the same Court, for that Province, * * and each of the said

Courts respectively, shall, subject to the provisions of this Act, have the same powers, jurisdiction, and authority, with reference to an election petition and the proceedings thereon, as if such petition were an ordinary cause within its jurisdiction."

Sec. 6 refers to the *Election Court* under the Act of 1873 ; but creates no such Court under the new Act.

Sec. 4, "' *Clerk of the Court*' shall mean the Clerk of the Crown, Chief Clerk, or Prothonotary, or any officer of the Court, prescribed for the purpose in question."

The presentation of a petition is to be made by delivering it at the office of the Clerk during office hours, or in any other prescribed manner : sec. 8, sub-sec. 3.

Sections 24, 25, 34, 35, 44, 54, 61, shew, in my opinion, but particularly sections 35 and 44, that *the Court* is the *Court* of Error and Appeal, the Queen's Bench, Common Pleas, or Chancery, in whichever of them the petition is delivered, and in which the proceedings are pending ; and that the words, *or any Judges thereof*, in section 3, do not make *any* of the Judges of all the Courts named an *Election Court*, or a *Court* apart or distinct from the respective Courts specified, of which they are members ; but that the expression, *or any Judges thereof*, has reference to 'The Administration of Justice Act of 1873,' passed on the 29th of March, 1873, more than a year before the Dominion Act in question was passed, by section 21 of which the Judges may sit separately, if it be so ordered, and the acts of the one or two so sitting separately shall be deemed to be the Act of the full Court, subject however to a rehearing before the full Court. And it has reference also to the fact that a less number than that composing the full Court shall have the power to sit and to act for the *full Court* under that statute.

I do not see cause for doubt as to this being the true meaning and effect of the third section of the Dominion Act of 1874 ; and the other sections of the Act before mentioned confirm me in that opinion.

The only other statute to be noticed is the 38 Vic. ch. 3,

O., 21st December, 1874, which transfers the power of the Court of Queen's Bench as to receiving election petitions and hearing appeals from the decision of the single Judge, to the Court of Error and Appeal, and to that extent confers upon it original jurisdiction, upon which, however, nothing turns in this case.

The Dominion Act of 1873 appears purposely to have avoided making the *Courts* of the Province, "Election Courts," or of giving to the Provincial Courts any new or additional jurisdiction or form of procedure.

And by the 39 Vic. ch. 9, sec. 10, D., the Corrupt Practices Act, the Parliament has constituted the Judge who tries such election petition a Court of Record by a special title, which avoids the difficulty of a Judge of the Court of Chancery exercising that criminal jurisdiction.

But the Act of 1874 has varied from the former Act in these respects, because, in my opinion, it has expressly authorized and required the Provincial Courts to dispose of these election matters, and it has not made the Judges of the Courts, as individual members thereof, a separate and independent Court from the Court to which they respectively belong.

Why that was done I do not know. It is manifest the framer of the bill had no idea he was infringing upon dangerous ground, if he thought of the question at all.

And it is certain that none of the Courts of the different Provinces, or any of the numerous counsel engaged in the election trials which have taken place under it, have, until lately, raised any question as to the validity of the Act.

At the time when the Act was passed, the Court of Error and Appeal in this Province possessed no original jurisdiction of any kind, but an appellate jurisdiction only.

It did not acquire original jurisdiction of the Ontario election cases till the 21st December, 1874, and that is the only original jurisdiction which it has ever had, or now has.

It is not and cannot be disputed that by the British

North America Act, the Legislature of this Province has exclusive jurisdiction over the administration of justice in this Province, and in the creation and constitution of Provincial Courts, both of civil and criminal jurisdiction, and over procedure in civil matters in those Courts.

The Legislature of this Province had therefore alone the power to define and limit the jurisdiction of the four Courts named in the Dominion Act of 1874; and it has done so by the different statutes which create and govern these respective Courts.

The Courts of Queen's Bench and Common Pleas are Courts of Record of original and co-ordinate jurisdiction, and possess all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction, and all the rights, incidents, and privileges of a Court of Record; and all other rights, incidents, and privileges as fully to all intents and purposes as the same were on the 5th of December, 1859, used, exercised, and enjoyed by any of Her Majesty's Superior Courts of Common Law, at Westminster in England; and may and shall hold plea in all manner of actions, causes, and suits, as well criminal as civil, real, personal, and mixed; and may and shall proceed therein by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same, or in matters which regard the Queen's revenue, (including the condemnation of contraband or smuggled goods) by the Court of Exchequer in England: R. S. O. ch. 39, sec. 4. And that was the jurisdiction of these Courts in 1859, and for long before that year.

The jurisdiction of the Court of Chancery is declared by the Revised Statutes, ch. 40, sec. 40, and the following sections. It possesses the widest equitable powers. It may award damages instead of directing specific performance. It may try the validity of wills, and pronounce them void, for fraud and undue influence or otherwise.

And by the R. S. O. ch. 40, sec. 86: it has since the 31st of December, 1877, jurisdiction "in all matters," (which

must be limited to civil matters) "which would be cognizable in a Court of law."

Before that date, I am inclined to think the Court of Chancery did not possess jurisdiction in all matters which were cognizable in a Court of law under the 36 Vic. ch. 8, sec. 32, O.

But by the R. S. O. ch. 40, just mentioned, the Court of Chancery did acquire, if it did not do so before, such jurisdiction, so that it then obtained jurisdiction over election matters under the Dominion Act of 1874, in like manner as the Superior Courts of common law had the jurisdiction.

But it is said, in answer to the objection that we have not the jurisdiction in question, that as these election matters belonged exclusively to the House of Commons, and were governed by the common law of Parliament, that the Parliament had the power to transfer the trial of these controverted elections to another tribunal than a select committee of the Commons, and it has merely delegated its powers to such other tribunal in such cases.

The petitioner's counsel further contended that to give effect to the respondent's argument would deprive the Dominion Parliament, which has complete control over Insolvency, of the right to refer the jurisdiction over such cases to the Judges of the County Courts of this Province, the official assignees, and the assignees, and to provide the special course of procedure which was necessary to carry out the provisions of the statute.

So in like manner, under the Customs Act, 31 Vic. ch. 6, sec. 99, D., the Parliament could not direct the penalties and forfeitures therein mentioned to be sued for in the Superior Courts of law here, nor when they were under \$200 to be sued for in the County Courts, nor that an arrest might be made for such penalties or forfeitures on an affidavit that there was reason to believe the person proceeded against would leave the Province without satisfying the penalty or forfeiture: sec. 104; nor that no action should be brought against any officer of the customs or

person employed for the prevention of smuggling, for anything done in the exercise of his office, until one month after notice in writing had been delivered to him or left at his place of abode; and that no evidence at the trial should be given of any other matter than is contained in the notice; and that no verdict or judgment shall be given unless such notice is proved to have been given; and on failure of such proof that the verdict and judgment shall be given for defendant with costs: sec. 119; nor that the plaintiff shall not in any such action recover more than 20c, and shall recover no costs, if the Judge certify on the record that the defendant acted upon reasonable and probable cause: sec. 122; nor to make somewhat similar provisions under the Inland Revenue Act, 31 Vic. ch. 8, secs. 155, 156, D.; and so in many other analogous instances which would be found throughout the statutes.

It was answered that in Insolvency before Confederation the Judge of the County Court had the like jurisdiction which he has by the Act passed since that time; and that the other proceedings are substantially the same as those which have been since directed to be taken; and that under the Customs and Inland Revenue Acts the former provisions are in like manner re-enacted by the Dominion Parliament; but besides that under the Customs and Excise Acts the Parliament has not interfered with the jurisdiction of the Provincial Courts, it has merely made use of them as it was entitled to in respect of matters already within their general jurisdiction. And I am of opinion the argument of the petitioner's counsel is well answered.

It is quite clear that by the Controverted Elections Act of 1874, the Courts therein specially named are required to perform a duty which they could not perform before that Act, because the particular subject which the Courts have been required to deal with belonged exclusively to the jurisdiction of a select committee of the House, as one of its privileges.

In conferring that power upon the Courts of Queen's Bench and Common Pleas, I do not think the Parliament

altered or enlarged the jurisdiction of these Courts, because by their original constitution they were gifted, as I have before shewn from the statute in that respect, with as ample powers as any Courts of common law could possibly require, exercise, or possess, and under these powers they had the jurisdiction to entertain and to try election cases other than parliamentary or legislative elections; and why might they not try these last named elections also, as proceedings *ejusdem generis* as those over which they had before full jurisdiction, if the right so to do were conceded to them.

If the Parliament had enacted that after the passing of the Act 37 Vic. ch. 10, D., all controverted parliamentary elections should be tried in the Courts having general and original jurisdiction over civil rights, or in other election cases in the Province in which the elections were held, and had provided no procedure for that purpose, the Courts of Queen's Bench and Common Pleas could, in my opinion, have entertained these Parliamentary elections and tried them by a *quo warranto*, or by an information in the nature of a *quo warranto*, or it may be by the exercise of their own original and inherent power they might, and by their statutory power they could, have provided a mode of procedure applicable to the case.

So in giving jurisdiction to the Court of Chancery, although the Dominion Parliament may have exceeded its limits at that time, if the Court of Chancery had not until the 31st of December, 1877, a general jurisdiction over such matters, yet on such general jurisdiction being conferred upon that Court by the R. S. O. ch. 40, sec. 86, the authority given to it by the Act of 1874 attached to it, and became a power exercisable by virtue of the Provincial statute.

If it be asked whether the Dominion Parliament has the power to enlarge or diminish the jurisdiction of the Provincial Courts, I answer it has not. And that is in accordance, not only with the language of the Confederation Act, but with the legislation and law of the neighbouring republic.

Their law on that point may be stated as follows :—Congress cannot vest jurisdiction in the State Courts, nor prescribe rules for them, and the State Legislatures cannot give jurisdiction to the National Courts.

By the Petition of Rights Act, 38 Vic. ch. 12 sec. 17, D., the Courts of Queen's Bench, Common Pleas, and Chancery are empowered to act under it. It is, however, provided that they shall not "have cognizance of any matter under this Act unless the Legislature of the Province, of which the same is a Court, shall have empowered the said Court to administer the rights by this Act conferred, in accordance with the procedure herein defined."

Which enactment expresses the opinion of the Dominion Parliament as to their rights and powers with respect to Provincial Courts, and to the procedure of these Courts.

It may be asked what is an extension or variation of the jurisdiction of the Provincial Courts?

It may be sufficiently answered by an illustration. The Division Courts have jurisdiction over "all claims for debt where the amount or balance claimed does not exceed \$100;" but it has no jurisdiction in "actions for spirituous or malt liquors drunk in a tavern or alehouse."

If the prohibition to entertain a claim for debt in these Courts for spirituous liquors drunk in a tavern not exceeding \$100 were removed by the Legislature, I do not conceive the jurisdiction of the Division Courts could be properly said to be increased, because these Courts had a general jurisdiction over "all claims for debt" up to the limited amount, and permitting a claim for debt founded on a tavern bill to be tried which was before excluded, is merely submitting to these Courts a matter which was covered by their prior general powers.

Again in the County Courts they have (subject to a qualified right to try ejectments) no jurisdiction of any action "in which the title to land is brought in question," or "for any libel or slander," and in other specified cases.

If, however, the Legislature granted to these Courts jurisdiction in actions in which the title to land was

brought in question, or for libel or slander, that would be an enlargement of jurisdiction, because such Courts had no such general jurisdiction over these matters previously.

If the Dominion were to enact that some particular act not now a crime should be a felony, the Criminal Courts of the Province, having a general jurisdiction in case of felonies, would take cognizance of the new offence, not, however, because their jurisdiction was enlarged, but simply because a new subject was made a felony, and so was brought or fell within the scope of their general pre-existing jurisdiction.

But if the Dominion Parliament were to authorize and require the Superior Common Law Courts to take cognizance of matters of marriage and divorce, or the Court of Chancery to take cognizance of crimes and misdemeanours, in like manner as the Courts of Queen's Bench and Common Pleas had cognizance of them, or the Court of Error and Appeal to be a Court of original jurisdiction in matters over which the Court of Chancery had jurisdiction; in these and the like cases, that would be an enlargement of jurisdiction attempted, which would be unconstitutional and void.

In submitting these contested elections to the Provincial tribunals, so far as relates to the Courts of Queen's Bench Chancery and Common Pleas, the Dominion Parliament has merely transferred certain civil rights, over which the Parliament had formerly exclusive jurisdiction, to the Courts which had a general jurisdiction over all civil rights before the passing of the Act, or which have since acquired it; and the submission of that new subject, for the reasons before given, was not and is not an enlargement of the jurisdiction of these Courts; simply, to repeat the statement, because these Courts had at the time of the passing of that Act, or have since that time acquired, the general jurisdiction in cases of the like nature.

In *Pasley v. Freeman*, 3 T. R. 51, at p. 63, Ashurst, J., said, "Where cases are new in their *principle*, there I admit that it is necessary to have recourse to legislative interference

in order to remedy the grievance: but where the case is only new in the *instance*, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to Courts of Justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago: if it were not, we ought to blot out of our law books one fourth part of the cases that are to be found in them."

In the *Montreal Centre Election Case, Ryan v. Devlin*, 20 L.C.Jur.77, Mr. Justice Johnson, who delivered the judgment of the majority of the Court, was of opinion that because the Parliament have, by section 91 of the British North America Act, the power to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, *but not so as to restrict* the generality of the foregoing terms of this section, it is declared that, *notwithstanding anything in the Act*, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects therein next enumerated,—the Parliament may legislate on matters assigned by the Act exclusively to the Legislatures of the Provinces; because the grant of that exclusive jurisdiction, it is said, is not to "restrict the generality of the foregoing terms," and because the *non obstante* clause over-rides the whole of that section.

In my opinion the legislative power of Parliament is excluded from "the classes of subjects * * assigned exclusively to the Legislatures of the Provinces."

It is confined to the making of laws "for the peace, order, and good government of Canada, in relation to all matters *not* coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces."

It would be strange to give *exclusive* jurisdiction to the Provinces in certain cases, and in the same breath subject that exclusive jurisdiction to the control of another power.

The words, "and for greater certainty, but not so as to

restrict the generality of the foregoing *terms* of this section," relate to the preceding terms "peace, order, and good government of Canada," qualified by non-control over the exclusive jurisdiction of the Provinces, just as if the section had read, *except in relation to those classes of subjects assigned exclusively to the Legislatures of the Provinces.*

I am also of opinion that the words, "notwithstanding anything in this Act," apply only to "the classes of subjects next hereinafter enumerated," and that their meaning is, if there is anything in the classes of subjects over which the Provinces have exclusive jurisdiction inconsistent with the exclusive control of the Dominion over the classes of subjects specially assigned to the Dominion Parliament, or over matters which relate to "the peace, order, and good government of Canada in relation to all matters *not* coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," then the Dominion Parliament shall have full authority to legislate.

But how can that be said to authorize the Dominion Parliament to alter the constitution of the Provincial Courts by granting to any of them powers repugnant to their constitution?

It surely cannot be said that the Dominion election trials necessitated any such violent interference with these Courts as has been contended for?

But it is said the Provincial Legislature could not give power to its own Courts, which did not possess before the power to try Dominion Election cases. I apprehend there is no doubt it could do so, *in order* to give effect to the Dominion Statute, if passed for that purpose, because that would be an extension of jurisdiction granted by the body which was alone duly empowered to give the jurisdiction, and in aid of the Dominion legislation.

It is not contended that the Provincial Legislature, in the absence of a Dominion Statute authorizing such cases to be tried by the Provincial Courts, could by usurpation

and encroachment upon the undoubted powers of the Parliament to deal with such matters as it pleased, take the control of these cases from the Parliament, and vest them in the Provincial Courts.

In determining that the Dominion Act, 37 Vic., ch. 10, is not *ultra vires* in declaring that controverted election cases shall be entertained and tried by this Court, I have answered the principal ground of exception taken to the validity of that Act, and to the jurisdiction of this Court.

There remains, however, the further objection, that the Dominion Parliament had no power to frame a course of procedure which is to be adopted by this Court in beginning, carrying on, and finally disposing of such cases, because "the procedure in civil matters in the Provincial Courts" belongs exclusively to the Provincial Legislature to settle and define.

I have had great difficulty in forming an opinion upon this part of the case.

It is no doubt true that the Dominion Parliament has no power over the procedure in our Courts in a civil matter such as this controverted election is.

And it is equally true, that according to the legal maxim, *Ubi jus, ibi remedium*.

If the Dominion Act had given no special remedy, I think it would be found that the party complaining was not remediless, for the want of right and the want of remedy are reciprocal: *Ashby v. White*, 2 Ld. Raym. 938, at p. 953; *Winsmore v. Greenbank*, Willes 577, at p. 581. A special action on the statute, or on the case, might have been maintained. I am of opinion the proceedings might have been begun by the ordinary writ of summons under sec. 3 of the Common Law Procedure Act. And it may be that a *quo warranto*, or an information in the nature of a *quo warranto*, might have been adapted to the case, although those proceedings are founded upon a violation of the rights, offices, or franchises of the Crown; or a mandamus might have been issued if the fact that these writs are not of right were not esteemed an objection by the House of

Commons, which would be unwilling to permit the intervention of the crown by name or otherwise where their privileges were concerned, and which would be likely to repudiate the notion of having their privileges tried and determined at the discretion of the Courts, or by a prerogative writ.

But, as before said, these writs might perhaps be capable of being adapted to the relief claimed, and might be issued as writs of right: *Barwell v. Brooks*, 3 Doug. 371; *Taylor v. Salmon*, 4 Mylne & C. 134. See note *z* to *Coryton* on Patents, 130; the references there made I cannot find.

We certainly have no process now as a petition by which a suit can be initiated as "an ordinary suit within our jurisdiction," nor have we such a practice as requiring the petitioner, before prosecuting his suit, to find security for costs. Nor have we the practice of trying causes without a jury absolutely. That practice is regulated by the R. S. O. ch. 50, secs. 252 to 258, under which the parties may claim a jury, although the Court or the Judge at the trial may afterwards dispense with the jury.

We could also, by the R. S. O. ch. 49, sec. 45, have framed rules or orders by which we could have adopted the procedure directed to be taken by the Dominion Act, but that has not been done by this Court.

If such rules or orders were made now, they might regulate the further proceedings in pending causes to which no such exceptions have been taken as have been taken by the respondent in this case: *Attorney-General v. Sillem*, 2 H. & C., Amer. ed., p. 1022; Additional Cases, at pp. 1030, 1034, 1040, 1054.

But they could not, I think, cure the objection which I am now considering.

The Crown may bring a mere real action, such as a *quare impedit*, or writ of right, in the Queen's Bench in place of the Common Pleas, for it may make use of any of its Courts at pleasure. In such a case the process and procedure would not be that of the Queen's Bench but that of the Common Pleas, to which such actions in the case of subjects exclusively pertain. But that is by prerogative.

The general rule however is, that whosoever resorts to a particular forum must take the remedies which are provided by that forum for suitors. We may administer foreign law, but we administer it as we would an ordinary cause within our jurisdiction, although the procedure in such a case might be wholly different in the country from that in which the original contract was made, or the cause of action arose.

In this case if the Dominion Parliament had enacted that upon the filing of a petition the respondent should be arrested, or that his property should be attached until he gave security to the satisfaction of the Court to abide by the decision and judgment to be given upon the petition, I should say that such an enactment would have been void. That has not been done, but a mode of procedure, not the rule or practice or procedure of this Court, has been framed for us to follow; and I must say, in the face of an objection pointedly and expressly taken to such an enactment, I do not see how we can maintain or justify it.

I am aware that the whole of what are known as *judicial writs* were framed by the Courts, and that the Queen's Bench and Exchequer Courts in England framed them so as by fictions to usurp jurisdiction in matters of which they had properly no jurisdiction; and that *Latitats* were issues upon a feigned return to a writ which was never issued.

I am aware, too, that the whole of the modern proceedings in ejectment were framed by the Courts and were founded on fiction, by which the real rights of the parties could be tried, and also that the Queen's Bench, to avoid the effect of the 13 Car. II. St. 2 ch. 2, which nearly ousted it of all its jurisdiction over civil injuries without force, framed the *ac etiam* clause in order to preserve its jurisdiction, and that the Common Pleas also adopted the like course to avoid the expense of a special original: 3 Bl. Com., 287, 288.

And I am not prepared to say we have not an original and inherent jurisdiction and power, if no procedure had been provided by the Dominion Act, and independently of

the very great powers which are conferred upon the Superior Common Law Courts by the Provincial Legislature, to have framed the necessary process if it had been required. But we have neither exercised our inherent original jurisdiction nor our statutory powers for this purpose; and the procedure which the petitioner has taken is specially excepted to as unconstitutional and void.

All that can be said in favour of this proceeding is, that in 1871 the Provincial Legislature enacted for the trial of Provincial controverted elections a course of procedure substantially similar to that which the Dominion Parliament has provided by the Act of 1874, and that such a procedure exists still, although the petition is not delivered into this Court, but was formerly delivered into the Court of Queen's Bench, and is now delivered into the Court of Error and Appeal, and that since the passing of the Act of 1874 petitions have been filed in some of the Courts of this Province, and that practice has never been questioned until quite lately.

I do not see very plainly by what legal authority the petitioner can file his petition, and call upon us to determine on such a proceeding the very important interests involved in it, and it may be necessitate the agitation of other serious matters for future trial and judgment.

I think that strictly the petition should be removed from the files of the Court; but I do not regret that my learned brothers, who have given this subject the most careful consideration, are of opinion that the petition filed can be supported in this respect.

In my opinion, the Provincial Legislature should validate all these petitions, and authorize, so far as it may be necessary to do so, the Courts named in the Dominion Act of 1874 to entertain such suits, and to proceed in and with them in the manner enacted by the Dominion Act of 1874, in like manner as if the procedure therein mentioned had been specially enacted by the Provincial Legislature, or as if such procedure had been specially allowed and provided for by the Superior Courts of Common Law, under the inherent or statutory jurisdiction of these Courts.

The British North America Act, sec. 94, and the 38 Vic. ch. 12, sec. 7, D., in the proviso, may be referred to in so dealing with this subject.

The result is, that these objections must be and are disallowed, with costs to be paid by the respondent.

RE SOUTH HURON ELECTION CASE—RITCHIE V. CAMERON.

Corrupt practices—Status of petitioner.

As preliminary objections to an election petition, it was alleged in substance that the petitioner, who was a voter at said election, could not be a petitioner, because he had been guilty of corrupt practices at the election of members of the House of Commons within eight years before, and at the election complained of.

Held, that the objections must be disallowed, for that under the 37 Vic. ch. 9, sec. 104, D., no disqualification arises until after the person has been *found* guilty, *i.e.*, after conviction.

In this case there were the same preliminary objections and judgment as in the *Niagara Election Case*, ante p. 261, above cases. There were also the further preliminary objections:—

10. That the said petitioner was at the election of members of the said House of Commons within the said electoral district, within and during the eight years previous to the filing of this petition herein, a voter within the said electoral district, and was at the said election of members for the said House of Commons guilty of corrupt practices, whereby, under and by virtue of the statutes in that behalf, the said petitioner became and was incapable of voting at the election complained of in his said petition, and was thereby disqualified for being a petitioner in respect of the said election.

11. That the said petitioner was, prior to and at the election complained of, guilty of corrupt practices, and was and became thereby incapable of voting at the election

complained of, and was and is disqualified for being a petitioner in respect of the said election.

In this term, November 30, 1878, the objections were argued.

Hodgins, Q. C., for the respondent. These were preliminary objections under the Act which the Court should determine, and not the Judge at the trial: *Youghal Election Petition*, 21 L. T. N. S. 306. There is a clear distinction between the disqualification of a candidate-petitioner, and of a voter-petitioner; the former is not disqualified until conviction, but the latter is disqualified from the moment of the commission of the act of bribery, for by the act of bribery he loses his status as a voter. The 37 Vic. ch. 9, sec. 104, D., enacts that "any person other than a candidate, found guilty of any corrupt practice in any proceeding in which, after notice of the charge, he has had an opportunity of being heard, shall, during the eight years next after the time at which he is so found guilty, be incapable of being elected to, and of sitting in the House of Commons, and of voting at any election of a member of the House of Commons, or of holding any office in the nomination of the Crown or of the Governor in Canada." The petitioner has not been found guilty, but the enquiry can be made now on this petition whether he is or is not guilty, and if he is found guilty he will become thereby disqualified from prosecuting this petition. He referred also to the *Bewdley Election Case*, 1 O. & H. 174; *Montreal West Election Case*, 19 L. C. Jur. 113; *South Renfrew Election Petition*, 10 C. L. J. N. S. 286; *Sligo Election Case*, 1 O. & H. 300-302; *Cunningham's Law of Elections*, 231, 234; *Norwich Election Petition*, 19 L. T. N. S. 619-621. It was further argued that the offence charged against the petitioner, although committed at a previous election, and at an election for a preceding House of Commons, was cognizable by this Court, because it would have been cognizable by the present House of Commons, inasmuch as it could, as a breach of the privileges of a former Parliament, be enquired into during a subsequent Parliament: *May's Parliamentary Practice*, 7th

ed., 102, 103; *Ferrall's* Law of Parliament, 124, 163; *Burdett v. Abbott*, 14 East 1, 102; 2 *Todd's* Parliamentary Government, 124; *Ilchester Case*, 1 Peck. 305; 2 *Douglas' Election Cases*, 404. The objections here presented were held to be good preliminary objections to the petition of a voter in the *Youghall Election Case*, and the *Montreal West Election Case*, before referred to, but not in the case of a candidate: *Drinkwater v. Deakin, In re Launceston Election Petition*, L. R. 9 C. P. 626.

H. J. Scott contra. The ground of disqualification of the petitioner is not a preliminary objection. It should form a part of the answer. The Court or Judge is, by the 37 Vic. ch. 10, sec. 10, to try the preliminary objection "in a summary manner." But that cannot be done now. It is not to be tried upon affidavit, and witnesses cannot be compelled to attend to give evidence. The persons entitled to vote at elections for the House of Commons are all those who are qualified to vote at the elections for members of the Legislative Assembly in this Province: 37 Vic. ch. 9, sec. 40, D. And those who are disqualified to vote for the Legislative Assembly in the Province are specified in the R. S. O. ch. 10, sec. 164, and sub-section, which is similar to the 37 Vic. ch. 9, sec. 104, D., excepting that in the Provincial Act the sub-section is a very important qualification of the terms of the general section.

December 11, 1878. GALT, J.—In this case, further objections were made, which have reference to the disqualification of the petitioner as a voter, and consequently would preclude him from being a petitioner.

The objections are, "10. That the said petitioner was at the election of members of the said House of Commons within the said electoral district, within and during the eight years previous to the filing of this petition, a voter within the said electoral district, and was at the said election of members for the said House of Commons guilty of corrupt practices, whereby, under and by virtue of the statutes in that behalf, the said petitioner became and was incapable of voting at the election complained of in his said petition,

and was thereby disqualified for being a petitioner in respect of the said election. 11. That the said petitioner was, prior to and at the election complained of, guilty of corrupt practices, and was and became thereby incapable of voting at the election complained of, and was and is disqualified from being a petitioner in respect of the said election."

By section 40 of 37 Vic. ch. 9, D., "All persons qualified to vote at the election of representatives in the House of Assembly or Legislative Assembly of the several Provinces composing the Dominion of Canada, and no others, shall be entitled to vote at the election of members of the House of Commons of Canada for the several electoral districts comprised within such Provinces respectively."

It is not asserted by the objections now under consideration that the petitioner was not a voter within the electoral district, but that he was disqualified from voting for the reasons set forth in the preliminary objections.

By section 164 of ch. 10, R. S. O., it is enacted that "Any person other than a candidate *found guilty* of any corrupt practice in any proceeding in which, after notice of the charge, he has had an opportunity of being heard, shall, during the eight years next after the time at which he is *so found guilty*, be incapable of being elected to and of sitting in the Legislative Assembly, and of being registered as a voter, and of voting at any election, and of holding any office at the nomination of the Crown, or of the Lieutenant-Governor in Ontario, or any municipal office."

Section 104 of 37 Vic. ch. 9, D., is the same, except that the person so found guilty is declared to be "incapable of voting at any election of a member of the House of Commons, or of holding any office in the nomination of the Crown or of the Governor, in Canada."

It is plain from the above provision that before disqualification attaches the voter must have been found guilty after he has had an opportunity of being heard.

It is not alleged that this petitioner has been found

guilty of any corrupt practice, consequently these objections must be overruled. To give effect to them would entail this absurd consequence, that in order to prevent the trial of a petition all that the respondent would require to do would be to assert (as is done in this case) that the petitioner had been guilty of corrupt practices, and this without any evidence of the truth of such a charge.

This point has been decided in the case of *Drinkwater v. Deakin, In re Launceston Election Petition*, L.R. 9 C. P. 626.

Objections disallowed, with costs.

GWYNNE, J.—Besides the objection as to the Act being *ultra vires*, taken in the case of the Niagara Election Petition and the other cases just decided, it is further objected that the petitioner is not competent to sustain the status of petitioner for the reason that, as is alleged, he committed bribery at the election of members of Parliament within eight years before, and also at the late election.

Assuming this to be true, the Act does not for that reason disqualify the petitioner from being a petitioner as a voter at the recent election. He was not disqualified from voting, the Act only having the operation of disqualifying a person as a voter after conviction.

There is nothing in this objection, as indeed has been decided by the *South Renfrew Election Petition*, to which we were referred, reported in 10 C. L. J. N. S. 286, upon the authority of a case decided in England, *i.e.*, *Drinkwater v. Deakin, In re Launceston Election Petition*, L. R. 9 C. P. 626.

Independently of authority, the point is free from all doubt upon the phraseology of the Act.

The objections in this case must also be disallowed, with costs to be paid by the respondent.

WILSON, C. J.—The constitutional question has already been disposed of. The respondent however set up in addition (setting out the further preliminary objections ten and eleven).

The petitioner alleges he was duly qualified to vote at the said election, and that he has a right to petition under section 7 of the Dominion Controverted Elections Act of 1874.

The respondent traverses that, by alleging the petitioner was guilty of corrupt practices—1. Within eight years before the filing of the petition; 2. By and at the election complained of.

The respondent, by section 7 of the Controverted Elections Act of 1874, D., may object “under section 10” of that Act “to any further proceeding on the petition by reason of the ineligibility or disqualification of the petitioner.”

Section 10: The respondent “may present in writing any preliminary objections or grounds of insufficiency which he may have to urge against the petition or the petitioner, or against any further proceeding thereon. * * The Court or any Judge thereof shall hear the parties upon such objections and grounds, and shall decide the same in a summary manner.”

What then is the preliminary objection or ground of insufficiency against the petitioner alleged by the respondent? It is that he was at a former election, and also at the election complained of, guilty of corrupt practices. Is that a disqualification according to section 7, last mentioned, or a preliminary objection or ground of insufficiency against the petitioner under section 10?

The disqualification is contained in section 104 of the 37 Vic. ch. 9, D., which enacts that “any person other than a candidate, *found guilty* of any corrupt practice in any proceeding in which, after notice of the charge, he has had an opportunity of being heard, shall, *during the eight years next after the time at which he is so found guilty*, be incapable of being elected * * and of voting at any election of a member of the House of Commons.”

That provision is also contained in the R. S. O. ch. 10, sec. 164, with this important sub-section, which applies to voters at Dominion elections also:

Sub-section 2: “No person other than a candidate shall

be subject to the disabilities set forth in the preceding subsection. (1) By reason of a merely technical breach of law ; or (2) by reason of any Act not being an intentional violation of law, and not involving moral culpability or affecting the result of the election."

The disqualification, it is plain, arises by the fact of the petitioner having been or being *found* guilty, after notice of the charge against him, and with an opportunity of being heard upon the charge, and the eight years of disqualification are to be computed from the day of conviction. Until the voter is *found* guilty he is not disqualified ; and there is no day from which the computation of the eight years can be made.

This petitioner has not been *found* guilty. He was not therefore disqualified from voting ; and being a duly qualified voter at the election, he is a properly qualified petitioner. If he had been before found guilty of corrupt practices, it would have been an easy matter for us to try as a preliminary objection whether that was so or not ; but it is quite another thing for us to try as a preliminary objection whether he is or is not guilty as alleged as a matter of fact.

The trial of the preliminary objection would probably be longer than the trial of the charge against the respondent, and these difficulties shew the propriety of the wording of the statutory provision, and the necessity for our adhering to it.

In a very well decided case of His Honour Judge Gowan under the Municipal Act, of *Booth v. Sutherland*, 10 C. L. J. N. S. 287, the respondent had before that been found guilty of acts which disqualified him from being elected.

The authorities referred to on this argument do not, I think, sustain the contention of Mr. Hodgins. The *Bewdley Election Case*, 1 O. & H. 175 ; *South Renfrew Election Petition*, 10 C. L. J. N. S. 286, and *Drinkwater v. Deakin*, *In re Launceston Election Petition*, L. R. 9 C. P. 626, are directly the other way.

The preliminary objections must be overruled, and, in my opinion, with costs.

WILSON V. THE STANDARD FIRE INSURANCE COMPANY.

Damage—Buildings within 100 feet—Warranty.

To an action on a policy of insurance against fire on a stock of goods, defendants pleaded setting up a condition of the policy, that the application, survey, and diagram, and all things therein contained should be taken and considered as part of the policy, and that if the applicant should make an erroneous or untrue representation or statement therein, or omit to make known any fact material to the risk, the policy should be null and void, and averred a breach of warranty in stating that there were no buildings or premises within 100 feet of that containing the insured property other than those mentioned in the application, survey, and diagram, whereas there were other buildings, describing them. The application contained twelve questions, none of which referred to the existence of buildings within 100 feet, which the applicant was required to answer and sign. Below the questions was a square space headed diagram, with a note on the north and west sides thereof, as follows: On the north: "Agents must write the word risk in red on the property proposed for insurance," &c. And on the west: "Use red ink for brick," &c. "Give all exposures within 100 feet, and mark distances between buildings." Below this space, and at the foot of the application was the following: "It is hereby expressly agreed, declared, and warranted, that each and every of the answers as above made is true, and that the same and this application and survey, and the diagram of the premises herewith, shall be part of the insurance contract and the policy hereby applied for," and the basis of the company's liabilities; and then, after providing that in case the agent should fill in the application he should for that purpose be the applicant's and not the company's agent, and for the case of the use of stoves, &c., it concluded, "And that the foregoing is a full, just, and true exposition of all facts and circumstances, condition, situation, and value of the property to be insured, so far as the same are material to the risk. Survey in all cases to be signed by applicant" and not by agent.

Held, that there was no such warranty as was set up, for that the application shewed that the only warranty was as to the answers to the questions submitted, none of which referred to the distance of buildings within 100 feet; that the applicant was only required to make known such buildings as were material to the risk, and it was proved that the buildings omitted were not of such a character.

To an action upon a fire insurance policy upon a stock in trade the defendant pleaded thirteen pleas. The judgment turned wholly upon the thirteenth.

In the seventh plea the defendants set forth the condition on the policy upon which they rested their defence set up in the 7th, 12th, and 13th pleas as follows: that the policy was made by the defendants subject to a condition thereon endorsed, that the application for said policy of insurance,

and upon which the said insurance was granted, the survey and diagram of the premises, and all things therein contained, should be taken and considered as part and portion of the policy; and that if in said application, survey, and diagram, the plaintiff should make any erroneous or untrue representation or statement, or omit to make known to them any fact material to the risk the said policy should be null and void.

In the twelfth plea the defendants alleged that the applicant for the insurance, whose assignee in insolvency the plaintiff is, in violation of the above condition, falsely and fraudulently represented that there were no other buildings or premises within one hundred feet of the building in which the insured property was situated, other than those in the said application mentioned, and also in and by said application wrongly and fraudulently made and furnished a false diagram and survey of the premises in which the said property was situated, in which he represented that there were no other building or premises within one hundred feet of the building in which the said property was situated other than those in the said diagram and survey shewn, whereas in truth and in fact there were buildings and premises within one hundred feet of the building in which the said insured property was situated, other than those in said application mentioned, and shewn in said diagram and survey, such representation being a fact material to the risk and to be made known to the defendants; and the said applicant for insurance concealed and omitted to make known to them in said application, diagram, and survey the situation of the said other buildings; by reason whereof the said policy was and is void.

In the thirteenth plea the defendants, after referring to the same condition endorsed on the policy, alleged that in and by the said application, survey, and diagram of the applicant for the said policy of insurance, which it was therein agreed should be part of the insurance contract and the policy applied for, and should form the basis of the liabilities of the defendants, the said applicant warranted and agreed to

and with the defendants that there were no other buildings or premises within one hundred feet of the building in which the insured property was situated, other than those in said application, survey, and diagram mentioned; and the defendants entered into the policy on the faith of and confiding in such warranty and agreement; whereas in fact and in truth there were buildings and premises within one hundred feet of the building in which said insured property was situated, other than those mentioned in the said application, known to the said applicant.

The cause was tried before Galt, J., without a jury, at Brantford, at the Fall Assizes of 1878.

At the trial, the case was rested wholly upon the thirteenth plea, and as to this it was shewn that in the yard directly in rear of the building in which the property insured was situate a hog pen, distant about 50 feet; in the yard in rear of the adjoining building upon one side there were two small water closets, a small ice house, and an open woodshed, within 100 feet of the building in which the insured property was, which were not shewn on the diagram; and in the yard in rear of the adjoining building on the other side there was a small woodshed. None of these buildings were burned by the fire which destroyed the building in which the insured property was.

The application referred to in the plea was produced. It contained twelve questions to be answered by the applicant for insurance with the following heading:

“THE APPLICANT WILL ANSWER THE FOLLOWING QUESTIONS, AND SIGN THE SAME, AS A DESCRIPTION ON WHICH THE INSURANCE IS TO BE PREDICATED.”

At the foot was a square space headed “diagram,” with a note on the west and north ends, as follows: On the west: “Note. Agents must write the word *risk* in red on the property proposed for insurance, and also indicate any other building on which we are carrying a line of insurance by writing thereon in red, ‘*Insured with us*,’ and also giving the amount in figures”; and on the north side: “Use red ink for brick or stone, and black for frames. Mark fire

walls with double red line. Give all exposures within 100 feet and mark distances between buildings."

At the foot of the space for diagram was printed the following: "It is hereby expressly agreed, declared, and warranted that each and every of the answers as above made is true, and that the same and this application and survey and the diagram of the premises herewith, shall be part of the insurance contract and policy hereby applied for, and shall be held to form the basis of the liabilities of the said company. And that if the agent of the company fill up the application, he will, in that case, be the agent of the applicant and not the agent of the company. And that no stove is or shall be placed nearer to a partition than eighteen inches, unless properly protected by some fire proof material; that all stoves are and shall be protected underneath by the same; that all stovepipes do and shall terminate in good chimneys; that where pipes pass through lath and plastered partitions or ceilings, they are and shall be protected by stone, brick, or cement tube, sound earthen crock or metal ventilator; and that no fact relative hereto, within the knowledge of any agent, shall be deemed to be known to the company unless the same be expressed herein or hereon. And that the foregoing is a full, just, and true exposition of all facts and circumstances, condition, situation, and value of the property to be insured, so far as the same are material to the risk. Survey in all cases to be signed by applicant; in no case by agents effecting insurance."

This document was signed by the applicant. The diagram shewed all buildings on the same side of the street as that on which was situated the building in which the property proposed to be insured was, and also those upon the the opposite side, but did not shew any of the small buildings above mentioned in the yards in rear.

Upon the back of the application was endorsed a question for the agent who effected the insurance to answer, with his answer as follows: "Have you personally inspected the premises, and do you recommend the risk"? "Yes."

(Signed) "W. G. NORSWORTHY, Agent."

At the trial two witnesses called by the defendants stated that the term "exposure" in insurance parlance, means any outside building or other thing which increases the risk.

The policy of insurance had upon it a condition, among certain variations to the statutory conditions, as follows: "It is hereby covenanted and agreed that the application of the insured, and upon which this insurance is granted, the survey and diagram of the premises, and all things therein contained, shall be taken and considered as part and portion of this policy, and if in said application, survey, and diagram the assured make any erroneous or untrue representation or statement, or omit to make known to the company any fact material to the risk, or make any untrue statement respecting title or ownership and the circumstances of the assured, or conceal any mortgage, execution or other incumbrance on the insured property, this policy shall be null and void."

The learned Judge charged the jury that the diagram was warranted to be true, and that if the evidence satisfied them that there were buildings within the distance of 100 feet the defendants were entitled to a verdict upon the thirteenth plea: and he said that in considering that question he did not refer to such an erection as a water closet or a pig pen, but that if there were stables and barns within that distance he thought they should have been mentioned, but that he did not think a person could be held responsible for leaving out a hen coop or a water closet. And he directed them, if they should find there were such buildings as a barn or stable within 100 feet, they should find for the defendants on the thirteenth plea, but that he did not use the word buildings as applying to water closets or pig pens, or such like.

The jury rendered a verdict for the plaintiff, and \$1060 damages.

In this term, November 21, 1878, *Bethune*, Q.C., obtained a rule *nisi* to set aside the verdict for the plaintiff, and enter a verdict for the defendants.

During the same term, December 3, 1878, *Hardy*, Q. C., shewed cause. There is no warranty as to there being no other buildings within 100 feet than those mentioned in the diagram. Under the application the warranty, if any, only applies to the answers to the questions, and there is no question asked as to the existence of buildings within 100 feet. At all events it would not extend to buildings generally but only to exposures. The defendants' own witnesses shew that exposures mean buildings or other things which would materially increase the risk. The note in the application as to the survey and diagram is merely a direction to the agent, and does not refer to the applicant. The agent is also expressly requested to state whether he has personally inspected the premises and recommends the risk, and he replies in the affirmative. If the diagram is incorrect it is through the fault of the agent, who with knowledge of all the circumstances drew it. The knowledge of the agent is the knowledge of the company, so as to make the company and not the insured responsible for and bear all the consequences arising from its incorrectness: *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 291; *Naughter v. Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121; *Laidlaw v. Liverpool, &c., Ins. Co.*, 13 Grant 377. Moreover the plea is not properly drawn so as to raise the question. It should have been that the plaintiff warranted the diagram to be true, and then should have averred the omission to state the existence of buildings within the 100 feet. Even if there were a warranty as to buildings it would not extend to buildings of the trifling character of those objected to here: *Naughter v. Agricultural Ins. Co.*, 43 U. C. R. 121.

Bethune, Q. C., contra. The proper construction to be put on the application is, that there was a warranty that there were no other buildings within 100 feet than those mentioned; and the thirteenth plea correctly states the warranty: *Anderson v. Fitzgerald*, 4 H. L. 507. The word exposure has not the limited meaning contended for. It is a larger and more extensive word than building, and means not only a building but also anything which would increase

the risk. And this is the construction intended to be placed upon it by the defendants' witnesses. The defendants are not bound by anything in the personal knowledge of the agent, but only by what appears in the application: *Billington v. Provincial Ins. Co.*, 2 App. 158.

December 27, 1878. GWYNNE, J., delivered the judgment of the Court.

It will be seen that in their twelfth plea the defendants plead the matter complained of as a wrongful and fraudulent misrepresentation in a point material to the risk, and also as an omission to make known to the defendants of matter material to the risk, while in their thirteenth plea they rest upon a warranty, which they allege the applicant made, that there were no buildings or premises within one hundred feet of that in which the insured property was situated other than those in the application, survey, and diagram mentioned.

The defendants' case having been rested wholly, both at the trial and on the argument before us, upon the issue joined on the thirteenth plea, and the warranty therein alleged, which warranty the defendants insist is contained in the insurance contract which they have entered into, we must, so far as the present rule is concerned, take it as not disputed that the finding of the jury, in so far as the other pleas are concerned, is correct: and that therefore we must treat the finding upon the twelfth plea as unobjectionable, the effect of the verdict upon which is to establish that the applicant did not *fraudulently* represent that there were no buildings within 100 feet of the building in which the insured property was situate other than those in his application mentioned; and that he did not *fraudulently* make and furnish a false diagram and survey of the premises in which the insured property was situate, in which he represented that there were no other buildings or premises within 100 feet of the building in which the said property was situate other than those in said diagram and survey shewn; and

that his omission to make known to the defendants the existence of the buildings complained of, although within 100 feet of the building in which the property proposed to be insured was, was not material to the risk.

The cases which come before us upon policies of fire insurance convince my mind of the importance of adhering to the ordinary rule of law, of construing these contracts, which are prepared by the companies themselves, if there be any ambiguity in them, most strongly against those who have prepared them.

In the application which the defendants required the applicant to sign it is to be observed that not a single question is asked the applicant as to whether or not there are any buildings of any description within 100 feet or any other distance of the building in which the property proposed to be insured was situate. The applicant's attention is drawn in large capitals to the importance of answering the questions, but as to the diagram his attention is as it were lulled to sleep by a note naturally calculated to induce the belief that this was a matter to be attended to by the agent of the company although true it is, that when done, and as the applicant might suppose correctly done by the agent, he is told at the foot that it is to be signed by him and not by the agent.

Then what do we find in the application about buildings within 100 feet of that in which the risk is proposed? Absolutely nothing but what is contained in what I think may be well termed a note addressed to the agent of the defendants in these words: "Give all *exposures* within 100 feet, and mark distances between buildings."

The defendants by their witnesses say that in insurance parlance this term "*exposure*" means "any building or other thing which may increase the risk."

Taking then their own explanation of the term, and of this *they* cannot justly complain, the note may be read as if it had been printed: "Give all such buildings or other things by which the risk may be increased that are within 100 feet"; and then the point to be tried would be, did or

not these things, the omission of which is complained of, increase the risk; and the warranty, if there were any, would be that the diagram shewed all such buildings and other things as were material to the risk and which were within 100 feet, &c.; so that warranty or no warranty, if such be the correct explanation of the term "exposure," the question would be the same. But the application itself shews that *no warranty* was intended as to the diagram shewing all exposures within 100 feet. The document explains itself. It is there said, "It is hereby expressly agreed, declared, and warranted that each and every of the answers as above made is true." Here is an express warranty confined to the answers, and that those answers, "and this application survey, and diagram of the premises herewith shall be part of the insurance contract hereby applied for, and shall be held to form the basis of the liabilities of the company." Observe, it is not here said that the diagram and survey truly represent all the exposures within 100 feet, &c., as the truth of the answers had been expressly warranted; but what is said is, that the answers, which have been warranted to be true, and the diagram and survey shall be part of the contract, and shall form the basis of the liabilities of the company. As to the answers, they alone are warranted to be true, and in the questions to which they are given there is not a syllable as to the number of any buildings or exposures within 100 feet or any other distance of the building in which the insured property was.

As to the answers then, they being warranted to be true, it is easy to understand that they became part of the insurance contract as a warranty; but how does the diagram or survey affect the contract or form a basis by which to determine the liability of the company? The document itself goes on to explain, in these words, "It is agreed that the foregoing is a full, just, and true exposition of all the facts and circumstances, *condition, situation*, and value of the property to be insured *so far as the same are material to the risk.*"

Now the contract, when it comes to be expressed in the

insurance policy, states that the policy is made subject, among other conditions endorsed, to the one which is set out in the plea, and which, so far as is material, is as follows: "And it is hereby covenanted and agreed that the application of the insured upon which this insurance is granted, the survey and diagram of the premises, and all things therein *contained*, shall be taken and considered as part and portion of this policy, and *if* in said application, survey, and diagram the assured make any erroneous or untrue representation or statement, *or omit* to make known to the company any fact material to the risk * * this policy shall be null and void."

Now here, as it appears to me, the defendants explain how the application, diagram, and survey are to affect or form part of the policy; and in this explanation a plain contrast and distinction is drawn between *things stated* in the application, diagram, and survey, and *things omitted to be stated therein*.

It may be conceded that all *statements* and *representations* contained in the application, &c., are warranted to be true, but we cannot, I think, treat as *statements* matter which is not in fact stated, but which is by implication sought to be inferred from what is stated, as being intended to be conveyed.

The condition seems to me very plainly to apply to two distinct things as to both of which provision is made, namely, things stated in the application, &c., and things omitted to be stated therein. As to the former of which the applicant warranted that they were as stated, by which I mean expressly and actually stated; and as to the latter, (which not being stated there can be no warranty that they are as stated), provision is made that the policy shall be null and void if anything material to the risk is omitted to be made known to the defendants.

In the former case the policy is avoided, although the *statement* which is untrue is as to a thing which is wholly immaterial to the risk, whereas in the latter materiality to the risk is the very essence of what has to be enquired into before the policy can be avoided.

This appears to me to be the fair and reasonable construction upon the condition which is in the plea stated to be incorporated into the policy.

What the plea says is, that the applicant for the said policy, in and by his application, survey, and diagram, warranted and agreed to and with the defendants that there were no buidings or premises within 100 feet of the building in which the insured property was situated, other than those in said application, survey, and diagram mentioned.

It is not pretended that the application, diagram, or survey taken separately, or all of them taken together, contained any such express stipulation or agreement; but what is contended is that inasmuch as the applicant signed the diagram, which did shew all buildings which were on the same and on the opposite side of the street, the non-insertion of those complained of, or of any others, must be taken to be a statement that there were no other buildings than those set out on the diagram within the distance of the 100 feet, and that such statement amounts to a warranty; and it is contended that this is a necessary consequence upon the direction contained in the note printed on the sides of the space left for the diagram, namely, "Give all exposures within 100 feet and mark distances between buildings."

It is one thing to say that the setting down some buildings as directed by this note within the named distance, and others beyond that distance, and omitting to insert those whose omission is now complained of, indicates by implication an intention to convey the impression that there were no others, and another thing that such omission constitutes a *statement* that none others exist.

The matters stated to be warranted in the application are only the answers to the questions. A manifest contrast is drawn between those answers and the diagram, which latter, although agreed to form the basis of the policy to be issued, may form such basis without any warranty that there are no other buildings than those shewn on the diagram.

It was for the defendants to shew to what extent they intended that the diagram should form the basis of the liability of the company, and that they have, as it appears to me, sufficiently clearly shewn by providing that the *actual statements*—that is, the answers to the questions—shall be warranted, but that as to matters *omitted* to be made known the policy should only be avoided if what was omitted was a matter affecting the risk.

This construction accords also with the defendants' own explanation of the term "exposure," namely such buildings or other things which might be material to the risk and which were within 100 feet.

The case, as it appears to me, comes clearly within the provision of the condition endorsed upon the policy and made part of it, as to things omitted to be set down on the diagram and to be made known to the defendants; and the point to be tried therefore was, did the omission to state these sheds, water closets, pig pen, and ice house affect the risk? Was it material to the risk that they should have been mentioned? a point as to which the defendants do not object to the verdict of the jury.

The defendants have chosen to rest their defence upon the plea of warranty. In this I think they must fail, and justly so, as it appears to me, for if they had intended that the omission to insert those things (the existence of which must have been known to the defendants' agent when he prepared the diagram, although it is signed by the applicant, and when he stated that he had inspected the premises and approved the risk), should operate as a warranty that there were none such in existence, they should have taken care that there should be no ambiguity as to what was intended, by fairly and squarely inserting appropriate questions pointing to the enquiry, to which they should have seen that express answers were given before they entered into the policy; or they should have inserted an agreement, as plainly as they have done as to the answers to the questions, that the diagram did contain a correct representation of all buildings within 100 feet of the build-

ing in which the property proposed to be insured was situate.

To treat the omission of the erections now complained of as a warranty of their non-existence, would operate as a great injustice to the applicant; and the attempt seems to display a design on the part of the defendants to entrap the applicant into warranting that which he never contemplated warranting, and to which as being matter to be warranted his attention was not drawn.

The charge of the learned Judge appears to me to have been more favourable than it should have been; and as I am of opinion that the applicant did not make any such warranty as that pleaded in the thirteenth plea, the verdict of the jury upon that plea, which was in favour of the plaintiff, should not be disturbed; and in my opinion the rule should be discharged, with costs.

WILSON, C. J., and GALT, J., concurred.

Rule discharged.

GERALDI V. THE PROVINCIAL INSURANCE COMPANY.

Insurance—Statutory conditions—Act relating to—Construction of—Agreement as to payment of premium—New trial.

One of the conditions endorsed on a policy, being No. 3, provided that no insurance, whether original or continued, should be considered as binding until the actual payment of the premium.

Held that, even if this could not be set up as a condition, not being one of the statutory conditions or a variation thereof, it might still be relied upon as an agreement of the parties which went to the foundation of the contract, and denied that the insurance ever came into existence.

Semble, per GWYNNE, J., dissenting from *Ulrich v. National Ins. Co.* 42 U. C. R. 141, and *Frey v. Mutual Ins. Co. of Wellington*, 43 U. C. R. 102, that the proper construction of "The Insurance Policy Act of 1876," was that the statutory conditions are to be adjudged and regarded as part of every policy, whether printed thereon as directed by the Act, or not, unless varied in the manner thereby prescribed.

In a declaration on a fire policy the policy was alleged to be subject to the conditions endorsed on the policy—not being the statutory conditions—which were set out in full, amongst which was No. 3. as above. The defendant pleaded on equitable grounds a second plea, that in and by said policy (and the conditions endorsed thereon and set out in the declaration) setting up the above provision, and alleging non-payment, upon which issue was joined. The learned Judge at the trial, on the authority of the cases above referred to, struck out the conditions from the declaration, as also the part between the brackets from the second plea, and upon this being done was of opinion that the declaration must be read as setting up a policy under seal which acknowledged the payment of the premium, and contained an unconditional covenant for the payment of the amount insured, and that the issue joined on the second plea must be found for the plaintiff, for whom he entered a verdict.

The Court directed the record to be restored to its former state, or so far as was necessary to enable the issue which had been joined between the parties as to the non-payment of the premium to be tried as joined.

THE plaintiff declared upon a policy of insurance against fire, made and executed under seal by the defendants in favour of the plaintiff, upon the 28th of February, 1877.

The action was commenced upon the 6th of October, 1877, and the declaration filed upon the 17th of that month.

In the declaration the plaintiff set out the body of the policy in full, and alleged it to have been made subject to the conditions thereon endorsed, among which was the following one, which is the only one having any bearing upon the question, viz.: 3rd. "No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium."

The declaration averred general performance of conditions precedent, the occurrence of the loss, and the happening of all things entitling the plaintiff to recover the amount secured by the policy.

Upon the 26th of October, 1877, the defendants filed their pleas, pleading 1. *Non est factum*; and 2. On equitable grounds "that in and by the said policy (and the conditions endorsed thereon, and which are set out in the said declaration) it is expressly agreed and understood that no insurance, whether original or continued, shall be considered as binding until the actual payment of the premium. And the defendants in fact say, that at the time said loss by fire occurred the plaintiff had not paid the premium on the said policy, therefore the defendants are not liable."

Upon the 29th of the same month of October, the plaintiff replied, taking issue upon both pleas, whereby the plaintiff undertook to establish, as entitling him to recover, 1. That the defendants did execute the policy; and 2. That the plaintiff had paid his premium.

These issues came down for trial in the month of September, 1878, before Armour, J., when the policy declared upon was produced; and—it appearing to be in the form formerly used by the company before the passing of the Insurance Policy Act of 1876, and having endorsed several conditions not among the statutory conditions in that Act mentioned, and among such the third condition as to payment of the premium above set out; and the statutory conditions not being endorsed upon the policy as directed by the Act—the learned Judge, acting upon the authority of the opinion expressed in the Court of Queen's Bench in *Ulrich v. National Ins. Co.*, 42 U. C. R. 141, and *Frey v. Mutual Ins. Co. of Wellington*, 43 U. C. R. 102, ordered all the conditions to be struck out from the declaration, and also the part between () in the second plea to be struck out of the plea.

This being done, the declaration stated the execution by the defendants of a policy under seal, which acknowledged the payment of the premium, and alleged that the

same contained an unconditional covenant by the defendants to indemnify the plaintiff, and to pay him for such loss as he should sustain, from fire, upon the property insured within twelve months from the date of the policy, and the plea read as averring that such policy contained a provision that no insurance should be binding until the actual payment of the premium.

The defendants' counsel objected to this exercise of jurisdiction by the learned Judge, which wholly changed the burthen of proof as to the matter which the parties had consented to go down to try, and which made an issue for the parties which they had not made for themselves, and which, as the learned Judge held that the policy produced was to be treated as one without any conditions, could only be found in favour of the plaintiff.

The learned Judge accordingly entered a verdict for the plaintiff with \$1,085 damages.

In this term, November 21, 1878, *Robinson*, Q. C., obtained a rule to shew cause why the verdict should not be set aside and a new trial had between the parties, on the ground that the learned Judge erroneously and improperly allowed the amendment, striking out the allegation in the declaration that the policy was subject to conditions, and held the policy to be without conditions.

In this term, December 5, 1878, *J. K. Kerr*, Q. C., and *Smythe* (of Kingston), shewed cause. The learned Judge at the trial, on the authority of *Frey v. Mutual Ins. Co. of Wellington*, 43 U. C. R. 102, and *Ulrich v. National Ins. Co.*, 42 U. C. R. 141, struck out from the declaration the conditions which had been set out therein, as well as the references thereto in the pleas. See also *Parsons v. Citizens' Ins. Co.*, 43 U. C. R. 261. The policy must therefore be deemed to be without any conditions or a covenant to pay the named sum unconditionally. The onus was on the defendants to prove their plea, and without the condition there was no evidence to support the plea. In *Sly v. Ottawa Agricultural Ins. Co.*, 29 C. P. 28, the plaintiff by setting out as here the

conditions in his declaration was held not to be afterwards preventing from objecting to their validity. Even if the statutory conditions are to be deemed part of the policy, this was not one of the statutory conditions. As to the effect of the non-payment of the premiums, they referred to *Xenos v. Wickham*, L. R. 2 H. L. 296, 319; *Johnson v. Provincial Ins. Co.*, 26 C. P. 113; *Montreal Assurance Co. v. McGillivray*, 13 Moore P. C. 87, 125. The next point is that it is not *ultra vires* of the Provincial Legislature to legislate concerning insurance. Insurance is not one of the subjects mentioned in either the 91st or 92nd sections with regard to which respectively each Legislature has exclusive jurisdiction; and it does not come within trade and commerce, but it comes within that class over which both Legislatures have concurrent jurisdiction.

Robinson, Q. C., contra. The course pursued by the learned Judge at the trial, has clearly caused a miscarriage of justice. If any intimation had been given to the defendants before the trial that the plaintiff intended to dispute the contract set out in his declaration, and that the issue joined was not going to be tried, the defendants would have drawn their pleas differently so as to have been in a position to raise the defence they desired. Assuming on the authority of the cases referred to that the policy must be deemed to be without conditions so as to prevent the defendants from setting up the conditions relied upon, the defendants had, notwithstanding, a good defence. In the application there is a provision in substance the same as this condition. This is in effect a stipulation or agreement which went to the foundation of the contract, and shewed that there was to be no contract until the agreement was complied with. The condition on the policy may also be looked at in this view. *Parsons v. Queen Ins. Co.*, 29 C. P. 188, shews that even though the conditions on the policy cannot be looked at as conditions, they may still be looked at to shew the intention of the parties as to the contract they are entering into. There certainly should be a new trial. The constitutional question need not now be discussed, as the

question is now before the Court of Appeal in *Ulrich v. National Ins. Co.*, 42 U. C. R. 141.

December 27, 1878. GWYNNE, J.—In *Ulrich v. National Ins. Co.*, 42 U. C. R. 141, decided in the Court of Queen's Bench after Michaelmas Term, 1877, after the parties to the action before us had joined issue upon the point which they desired to have tried, the present Chief Justice of this Court, then a Justice of the Court of Queen's Bench, expressed it to be his opinion that if a policy was issued subsequently to the passing of the "Fire Insurance Policy Act of 1876," not having the statutory conditions endorsed upon it, it should be treated as a policy issued without any conditions, no matter what or how many conditions it might have endorsed on it, and subject to which the policy in its body declared that it was issued, as part and parcel of the insurance contract.

The Chief Justice of the Court of Queen's Bench did not then concur in that opinion, nor was the point one necessary to be decided in the case, for the judgment proceeded upon another point, so that the point upon which Mr. Justice Wilson expressed the above opinion did not by the judgment in that case become *res adjudicata*.

In *Frey v. The Mutual Ins. Co. of Wellington*, 43 U. C. R. 102, decided in the Court of Queen's Bench in Hilary Term, 1878, the point was for the first time adjudicated, and determined by the judgment of the Court in accordance with the opinion expressed by Mr. Justice Wilson in *Ulrich v. National Insurance Co.*

The question now arises, whether that is an authority conclusively binding upon us in the matter arising in the case before us.

The practice of adopting and following the judgments of Courts of co-ordinate jurisdiction has prevailed to a greater extent in our Courts than it ever has in England, as will appear by reference to *Roe dem. Fulham v. Wickett*, Willes's Rep., at p. 303, and *Hobbs v. London and South-Western R. W. Co.*, L. R. 10 Q. B. 111, at p. 117.

The rule no doubt is a good one, and proper to be followed in all cases where the former judgment is one of long standing, and where it may fairly be presumed that it has affected dealings in respect of the same subject matter entered into subsequently to the delivery of the judgment. But like all rules it has its exceptions. Where we find the judgment to be very recent, and putting a construction upon a statute itself but recently passed, and where, as in the case before us, the parties were at issue as to the matters they desired to have tried before ever the judgment relied upon was given, I have come to the conclusion that either party to the suit before us is entitled to demand of us, and that in compliance with such demand we are bound to give our own independent opinion upon the construction of the statute irrespective of the decision in the Court of Queen's Bench; and with the greatest respect for the opinions of the learned Judges who have rendered the judgments referred to in that Court, I must say that I have been unable to bring my mind to concur in that judgment.

The statute (a) in its preamble recites the appointment of a commission under the authority of the Act 38 Vic. ch. 65, requiring that commission to consider and report what conditions were just and reasonable to be inserted in fire insurance policies; and that the commission had settled and approved the conditions set forth in a schedule to the Act, and that it was advisable that the same should be expressly adopted by the Legislature as the statutory conditions to be contained in the policies of fire insurance entered into or in force in this Province.

Now this preamble shews, as it appears to me, a very plain intention that those statutory provisions should affect, limit, and control all contracts of fire insurance to be entered into or in force in this Province.

To carry out this intention the enacting clause then declares that "The conditions set forth in the schedule to this Act, shall, as against the insurers, be deemed to be part

(a) 39 Vic. ch. 24, O.

of every policy of fire insurance hereafter entered into or renewed, or otherwise in force in Ontario, with respect to any property therein, and shall be printed on every such policy with the heading 'Statutory Conditions,' and if a company (or other insurer,) desire to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect:—

"Variations in Conditions.

"This policy is issued on the above statutory conditions, with the following variations and additions: These variations are, by virtue of the Ontario Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company."

Now in this clause are contained, as I conceive, two directions. The one addressed to the persons preparing the insurance contract or policy, directing them to have those statutory conditions printed upon every policy they enter into. The other providing for the case of their neglecting to do so, and enjoining the Court in which any question arises upon the policy to regard the policy, notwithstanding such neglect, as containing those conditions.

"The conditions shall be *deemed* to be part of every policy." This expression plainly provides for the case of their not being on the policy, for if upon the policy there would be no occasion for providing that they should be *deemed* to be there, and being there, they must have their legal construction as part of the contract.

Then observe there is not a word said to the effect that if not printed upon the policy as directed, they shall not be regarded as part of the policy—quite the contrary—it is then that this direction, which as I submit is addressed to the Court, becomes material and comes into action, they shall be *deemed* to be part of the policy, although not appearing on it.

The word *deemed* means accounted, regarded, adjudged, according to Webster: adjudged, supposed, believed, ima-

gined, determined, according to Worcester: adjudged, concluded on consideration, according to the Imperial Dictionary.

The appropriate meaning in this connection appears to me to be—be “regarded,” shall be “adjudged,” or determined,” to be part of the contract.

Now when does the occasion arise when this direction can be applied? From the nature of the contract, which is one only of indemnity against loss, it never can arise unless there be a loss and an action brought to recover the indemnity agreed by the policy to be paid, which action must of necessity be one at the suit of the insured against the insurers, so that in effect this direction can be obeyed only in the case of such an action being brought; and the statute must therefore be read as directing that in every such action, these conditions must be regarded and adjudged as being part of the insurance contract, and being such must be given their natural legal construction, force, and effect.

But is said, not so, for that the Act says it is only *as against the insurers* that the conditions are to be deemed to be part of the policy. Surely these words can have no such meaning attached to them. The expression “*as against the insurers*,” seems to me to be reasonably convertible into the expression “*in favour of the insured*,” but it matters not which it is, for against whomsoever it may operate, the direction is, that the conditions shall be regarded, &c., as part of the policy, and if part of it, they must be given their legal force and effect, whatever that may be.

But, as I have already said, when is the occasion to arise when the direction is to apply, unless it be in an action upon the policy, at the suit of the insured against the insurers? And in what manner are they to be deemed to operate against the insurers? Consider what is the nature of these conditions. They are every one devised and framed in the interest of the insurers. They are all, except one or two, which declare that some things

shall be incapable of insurance, and that other things shall not be insured unless specially mentioned, conditions devised and framed for the protection of the insurers, and are in fact in defeasance of the policy in their favour in certain specified events. Now how can conditions so devised and framed be ever regarded, taken or adjudged, to be *part* of a policy *as against* the persons in whose interest alone they are devised and constructed? For, observe, the reading of the statute is, that they are to be deemed to be part of the policy as against the insurers, not that as against the insurers they shall be regarded as *not* part of the policy—this latter being the reading which the decision in the Queen's Bench seems to require.

With great deference I submit that the words cannot admit of the construction put upon them by the judgment of the Court of Queen's Bench, even though no other construction could be suggested. But I submit that they are open to another and more natural construction, namely, that as against the insurers these statutory conditions, (whether omitted altogether and others substituted in their place, or whether some be omitted and others retained, and new ones added), shall *alone* be regarded as part of the policy, unless the variations, whether of omission, substitution, or addition, shall be printed on the policy in the manner prescribed by the Act, the object being that no departure whatever from the statutory conditions shall be allowed or recognised, unless in the manner prescribed in the Act, and that in default of variations therefrom in the manner so prescribed, all policies shall be read as containing the statutory conditions alone, and whether the same should or not be printed on the policy as directed by the Act.

That this is the true construction appears to me to be confirmed by the second clause, which enacts that, "Unless the same is distinctly indicated and set forth in the manner, or to the effect aforesaid, no such variation, *addition or omission* shall be legal and binding on the insured; but the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions

or *omissions* are distinctly indicated and set forth in the manner or to the effect aforesaid."

Now note here, variations of addition or *omission*, are put precisely upon the same footing.

Suppose now a policy to be effected not having any of the statutory conditions endorsed thereon, but having others, and nothing to indicate "variations in conditions," as prescribed by the Act, then according to the provision of the second clause, the policy shall "*as against the insurers* be subject to the statutory conditions only," notwithstanding the additions, and notwithstanding the *omission* of all the statutory conditions from the policy.

This, to my mind, conveys the plain intention of the Legislature to have been that *every policy* should operate as against the insurers as subject to the statutory conditions, and to them only, whether printed thereon as directed by the Act or not, unless they should be varied in the special manner prescribed by the Act.

But it is said that the third condition set out in the declaration as one of those upon which the insurance contract declared upon was entered into, and in relation to which alone, of all the conditions, the issue between the parties in this case is joined, is not one of the statutory conditions, and that therefore it matters not whether the statutory conditions are or are not to be deemed to be part of the contract.

True it is, that it is not one of the statutory conditions for they are framed in defeasance of a contract completely entered into; but neither can it be said to be a variation from the statutory conditions within the meaning of the Act, for the matter relied upon as a defence under this condition, or agreement as it may more properly be called, goes to the foundation of the contract, and denies that it, ever came into existence so as to create any liability in the defendants for default of the plaintiff to pay his premium, payment of which is the sole consideration for a contract of indemnity against loss.

Now an agreement in a letter, or in any other independent writing to the effect stated in this third condition,

might, I apprehend, have been adduced in evidence upon the part of the defendants, if necessary, in support of their contention. Why might not then the same agreement be read in evidence by the defendants, if necessary, from the endorsement on the policy; or why should not the plaintiff be at liberty to state in his declaration, as he has done here, to the effect that the policy was prepared and executed upon the faith of an agreement that it should not come into existence or take effect until payment of the premium, and to confine and limit the issue as was done here to the single point—was the premium paid or not?

It would have been open to the defendants to have raised the point upon the record by equitable plea, notwithstanding the acknowledgment or receipt contained in the policy, even though it had been framed subject to the statutory conditions only, and had been declared on as such.

It therefore seems to me there was less reason for altering the record, and in effect expunging the issue which the parties had joined in the way most agreeable to themselves by a denial on the one side, and an affirmance upon the other, of the payment of the premium.

I cannot see how that question could have been more conveniently raised than it was by the issue joined between the parties. The declaration might have been less prolix, to be sure, if all the conditions other than the third had been omitted, and for anything they had to do with the issue joined they might have been originally omitted; but I see no reason why the plaintiff might not be allowed to state in his declaration the truth as to the agreement involved in that third condition for the purpose of raising the issue upon which he was willing to rest his right to recover, namely, as to the payment of his premium, notwithstanding anything contained in the Act as to statutory conditions.

I think, therefore, that the issue should have been tried as presented to the Court by the parties themselves, which certainly seems to me to have been as convenient a mode as possible in which it could have been presented, nor is there anything in the Act which, as it seems to me, called

for the alteration made in the record to the prejudice of the defendants.

In my opinion, therefore, the verdict for the plaintiff should be set aside, and the record restored to its former condition, or at least so as to retain the statement in the declaration that the policy was upon and subject to the agreement contained in the third condition stated in the declaration, and that the issue joined upon the point whether the premium was paid or not should be tried as joined.

WILSON, C. J.—The condition which provides that no insurance shall be considered to be binding until the actual payment of the premium, is not governed by the statute relating to insurance statutory conditions or variations. That Act relates to contracts of insurance which have been made. The above stipulation refers to a precedent act to be done, without which there is to be no contract.

It is of no consequence where that condition or stipulation is put. Whether on the face or on the back of the policy, or whether it is upon it or not, or in writing or not, it is equally binding, and there is no contract completed until the terms of the condition have been complied with, or waived or rescinded.

An agreement drawn up and signed, but not to be a bargain until a third person approved, and he did not approve, was held to be no bargain: *Pym v. Campbell*, 6 E. & B. 370; *Wallis v. Littell*, 11 C. B. N. S. 369; *Lindley v. Lacey*, 17 C. B. N. S. 578; and *Rogers v. Hadley*, 2 H. & C. 227, are to the like effect.

The issue raising that question should not therefore have been struck from the record.

As to the other part of the case it is not necessary I should make any observation. There must be a new trial, without costs.

GALT, J.—I concur in holding that the condition may be read as an agreement of the parties, that the performance thereof was to be a precedent act to the insurance coming into force. I express no opinion on the other part of the case.

Rule accordingly.

MCKENZIE V. THE MONTREAL AND CITY OF OTTAWA
JUNCTION RAILWAY COMPANY.

Debentures—Coupons—Assignee—Equities arising—Recovery.

By sec. 13 of 34 Vic. ch. 47, D., the defendants' Act of Incorporation, they were empowered to issue bonds or debentures in such form and amount, and payable at such times and places as the directors might from time to time appoint, &c. ; and by 35 Vic. ch. 12, sec. 2, O., the bonds or debentures of corporations made payable to bearer, or any person named therein as bearer, may be transmitted by delivery, and such transfer shall vest the property thereof in the holder, to enable him to maintain an action in his own name. The defendants issued bonds or debentures, with coupons attached for the payment of the interest half-yearly, payable to bearer, and delivered them to C. & Co., the contractors for the building of the road. The coupons for the first instalment of interest not having been paid, the plaintiff brought an action thereon, alleging an assignment to him, and that he was the lawful holder thereof.

Held, that the plaintiff held the coupons freed from any equities arising between the defendants and C. & Co. under an agreement creating a charge upon such instruments, and a plea setting up the forfeiture of such debentures under such agreement, was held bad.

THE declaration contained nineteen counts upon coupons for interest. The first count will sufficiently describe the other counts.

It alleged that the defendants, by their bond or debenture, dated the 11th of November, 1872, numbered 0001, sealed with their corporate seal, and signed by the president and secretary of the company, bound and obliged themselves and covenanted to pay to the bearer of the said debenture, on the first of September, 1902, the sum of \$1,000, current money of Canada ; and also bound and obliged themselves, and covenanted with the bearer of the said bond, to pay interest thereon at the rate of seven per cent, half-yearly, on the 1st days of March and September, at the Royal Canadian Bank in Montreal, on the presentation at the said bank of the proper coupons therefor, and then to the said bond annexed, one of which coupons, now overdue, was in the words and figures following: " Montreal and City of Ottawa Junction Railway Company, due 1st September, 1873, on bond issued for \$1,000 at 7 per cent.,

\$35, payable at the Royal Canadian Bank, Montreal. Bond, No. 0001. D. A. Macdonald."

And the company delivered the said bond to certain persons, trading under the name of A. L. Catlin & Co., who thereby became the lawful holders of the said bonds and coupons. And that after the making of the said bond, the said coupon for the sum of \$35, being the instalment of interest due on the 1st day of September, 1873, was duly presented at the Royal Canadian Bank, being the place where the said coupon was payable; and the said coupon was not paid, but was dishonoured, and payment thereof was refused. And the said coupon, and all claims in respect thereof, have been duly assigned to the plaintiff, who has become, and is, the lawful bearer of the said bond or debenture and the said coupon, and who now sues for the recovery of the amount of the said coupon.

Fourth plea: That prior to the making of the bonds or debentures, Catlin & Co. entered into a contract under seal with the defendants, which contract contained, among other provisions, one in the words and figures following, setting it out, the effect of it being that the defendants bound themselves to pay \$2,025,000, exclusive of extra work, to the contractors:

1. In cash and municipal bonds, \$2,000 per mile.
2. In bonds or debentures to be taken at par of the defendants, payable at not less than thirty years from the date thereof, having a mortgage on all the said road prior to any mortgage, hypothec or claim created or constituted by the defendants, the sum of \$15,000 per mile.
3. In guaranteed shares of the capital stock of the defendants, to be issued from time to time by the defendants in favour of the contractors, to the extent of \$8,000 per mile, which shares, with interest at eight per cent., should be a first charge guaranteed, and to be paid to the contractors or holders of the said guaranteed shares, before any dividend is paid on the shares.

Payments to be made by the defendants of \$20,000 of such bonds and \$10,000 of such guaranteed stock for every ten miles graded, and farmers' crossings made.

And, in addition, \$2,000 in cash or municipal bonds per mile, for twenty-two miles graded in Ontario.

And payments as aforesaid shall be at the same rate and in the same proportion for the balance of the said road.

And as to the balance of the contract price, half thereof shall be paid in like manner when required by the contractors to meet the payments of the purchase of iron rails, which rails shall be consigned to the defendants, and the remaining half as the iron is laid in sections of ten miles, less the ten per cent. to be left in the hands of the defendants till the road is completed to the satisfaction of the engineer, when the sum so retained shall be paid to the contractors within ten days after the engineer's certificate has been made and has been received by the defendants. But in case of failure by the contractors to comply with and complete the contract, the said per centage, as well as all the moneys and sums that may be due and unpaid to them at the time of such failure, shall be forfeited to and retained by the company. And the defendants aver that the debentures or bonds in the declaration mentioned are debentures or bonds of the defendants, and that the same were a portion of those delivered to the contractors pursuant to the terms of the said contract, and especially of the above mentioned provision thereof. And the defendants further aver, that thereafter, and before the commencement of this action, the contractors failed to comply with and complete the said contract.

Fifth plea: Like the above, but concluding as follows : And the defendants further aver, that the plaintiffs became the holders of the said coupons after the same became due.

Demurrer to these pleas.

The demurrer came on for argument before Galt, J., sitting for the full Court, who gave a formal judgment for the plaintiff.

In this term, November 30, 1878, the case was reheard before the full Court.

McMichael, Q. C., for the demurrer. The defendants were incorporated by the 34 Vic. ch. 47, D. The plain-

tiffs took a title by delivery of the debentures and coupons according to their very terms, and he may therefore sue: *Geddes v. Toronto Street R. W. Co.*, 14 C. P. 513; 35 Vic. ch. 12, sec. 2, O.; *Re Imperial Land Co. of Marseilles*, L. R. 11 Eq. 478. If this were the assignment of a chose in action there was no default at the time of the assignment, for none is alleged: *Daniel* on Negotiable Instruments, vol. ii., pp. 424-432, secs. 1486-96.

J. K. Kerr, Q. C., contra. The case of *Geddes v. Toronto Street R. W. Co.*, 14 C. P. 473, shews that the debentures and coupons must be read, as they are payable to bearer, just as if the contractors to whom they were delivered had been named in the same. The plaintiff says the coupons were duly assigned to him, while the statute protects the holder of them by delivery. He referred to *Wright v. Corporation of Grey*, 12 C. P. 479; *In re Natal Investment Co.*, L. R. 3 Ch. 355; *Re Blakely Ordnance Co.*, L. R. 3 Ch. 154; *Crouch v. Credit Foncier of England, Limited*, L. R. 8 Q. B. 374, 380, 385; *Miller v. Race*, 1 Sm. L. C., 7th ed., 526; *Enthoven v. Hoyle*, 13 C. B. 373, 390; *Gould v. Close*, 21 Grant 273; *Re General Estates Co.*, L. R. 3 Ch. 758.

December 27, 1878. WILSON, C. J.—By the Act of Incorporation, 34 Vic. ch. 47, D., the defendants, by section 13, were “empowered to issue bonds or debentures which * * shall be in such form, and for such amount, and payable at such times and places as the directors may from time to time appoint. * * The said bonds or debentures shall be signed by the president or vice-president, and shall have the corporate seal of the company affixed thereto.”

By the 35 Vic. ch. 12, sec. 2, O., it is enacted that “the bonds or debentures of corporations, made payable to bearer or any person named therein, may be transferred by delivery; and such transfer shall vest the property of such bonds or debentures in the holder thereof, to enable him to maintain an action thereof in his own name.”

That enactment, it appears to me, really concludes the question.

But as authorities were referred to, I shall examine them.

I may mention here, before proceeding further, that by the Act of Incorporation, section 12, the defendants are empowered to become parties to promissory notes and bills of exchange, for sums not less than \$100 each, under the authority of a quorum of the directors, "provided, however, that nothing in this section shall be construed to authorize the said company to issue notes or bills of exchange, payable to bearer, or intended to be circulated as money, or as the notes or bills of a bank."

These bonds or debentures, under the above enactment, must be held to be not promissory notes or bills of exchange.

In the case of the *Imperial Land Company of Marseilles*, L. R. 11 Eq. 478, cited for the plaintiff, it was held on an instrument in form, like the one now in question, that the instruments were promissory notes, or if not that they were negotiable instruments, and amounted to contracts to pay any one who might happen to be the bearer; and that the holders for value, without notice of the equities between the original parties, were entitled to prove for the amount due free from the equities.

The Vice-Chancellor, Malins, at p. 490, said: "It would be contrary to every principle, and fatal to the existence of such instruments in this and all other companies, if in the hands of every person taking them they were subject to the equities between the company and the original holder; it would be a blow to the mercantile transactions of this country far beyond the value of any protection to be afforded to the members of this company, who, if they were unfortunate, were unfortunate in being betrayed by the persons to whom they committed their interests. Every principle of public policy calls upon us to repudiate the notion that such documents are to be treated like bonds or *choses in action*, in which the equities between the parties can be entered into."

In that case the documents had been issued in performance of a fraudulent contract between the directors and the person to whom they were delivered.

The case of *Re General Estates Co.*, L. R. 3 Ch. 758, is also to the like effect.

Re Blakely Ordnance Co., L. R. 3 Ch. 154, the debentures under seal were payable to "B. and D., their executors, administrators, and assigns, or to the bearer hereof." *Semble*, that they could not be sued upon at law by the bearer in his own name, and that he held them free from any equity between the company and B. and D.

The case of *Re Natal Investment Co.*, L. R. 3 Ch. 355 is not like this, and does not seem to be approved of in later cases. See *Re Hercules Ins. Co.*, L. R. 19 Eq. 302, 312. And it is opposed to the principle laid down in *Re Agra and Masterman's Bank*, L. R. 2 Ch. 391, at p. 397, viz. that although, "generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities."

In *Crouch v. Credit Foncier of England, Limited*, L. R. 8 Q. B. 374, such instruments as the debentures in question were held to be instruments to which the company could not attach the incidents of negotiability contrary to the general law, and the plaintiff therefore could not recover upon them in his own name.

There are many other cases bearing upon this point, to which it is unnecessary particularly to refer.

Every case upon this subject establishes the proposition that a company issuing debentures payable to bearer, or to a person named as bearer, does so with the intent that the person to whom they are delivered shall deliver them over as an ordinary transferable instrument, and that when the one to whom they were first delivered does transfer them to another for value, the company cannot attach to these securities in the transferee's hands for value any equity whatever which they might have set up against the payment of these instruments if they had con-

tinued in the possession of the original holder of them : that such a claim is inconsistent with the terms of such instruments and with the purposes and objects for and with which they were issued, and, if allowed, that it would be contrary to public policy and to the universal custom of dealing with such instruments, and would render them utterly valueless, because no one would take them.

In this case these debentures were no doubt paid out to the contractors for work done, or value given. The debentures themselves were not cash. The contractors could not carry on the works with these debentures in their hands ; they must sell them, as it is called, for the price they would fetch in the market. The defendants knew the contractors would do so, and would have to do so, and that they could not advance with their contract without doing so. They knew also that those who bought them would take them on the faith that they were, as bearers, getting a good title to them, and to the money they represented, and that the defendants would recognize the transferees as the persons, and the only persons, who were entitled to receive payment of the debentures which they held. The company knew also that the purchaser did not and could not know of the private bargain between the contractors and the company creating a charge upon such instruments ; and they knew, too, that not one of these debentures could have been sold if it had been declared on their face that they were subject in the transferees' hands to all equities between the company and the contractors, or if they had thought that there was any rule of law which gave to the company such a right. The company had, no doubt, received the value of these debentures before they issued them, and others, including the plaintiff have given value to the contractors for them. It would be a direct and manifest fraud if, after issuing such documents, and for such a purpose, and after receiving, as this company must have done, full value in work for them, they were now to set up an equity which they had against the contractors as against those who have given value for these debentures, which the company it

may be said sent into the market with a declaration that they would pay any one who took them and gave value for them.

In the case of *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642, the debentures of the company were transferable by the statute, and the illegality of the debentures, as between the original holder and the company, was not allowed to be set up as against the plaintiffs, executors of the testator, who had taken them in good faith and for value.

In the case last mentioned, the action was in the names of the executors of the assignee at law, because the statute made the securities transferable.

But for that the plaintiffs must either have sued in equity in their own name, or at law in the name of the original holder.

By our statute these debentures are transferable, and the transferee may sue in his own name as he has done.

Beyond all question the plaintiff must recover from the defendants on the merits, and on every principle of law and right, in some form or other, without regard to equities or supposed equities of the defendants against the contractors; and beyond all question that recovery may be had at law.

There will therefore be judgment for the plaintiff on demurrer.

GWYNNE, J.—The statute making these debentures transferable by delivery is conclusive upon the point in favour of the plaintiff.

GALT, J. concurred.

Judgment for plaintiff.

COULSON V. O'CONNELL.

Costs—Title to land—Certificate—Practice.

To an action for negligently setting out fire, which spread to the plaintiff's land and damaged his woods, the defendant, amongst other pleas, pleaded that the land and property were not the plaintiffs. There was a verdict for the plaintiff with \$50 damages, but no certificate for costs. *Held*, following *Humberstone v. Henderson*, 3 P. R. 40, that the plea raised the question of title to land, and that the plaintiff was therefore entitled to full costs without a certificate. That decision, being upon a point of practice, was adhered to, though placing a construction on our statute different from that put upon substantially similar language in the English Act.

ACTION for negligently setting out fire on defendant's land, by which the woods on plaintiff's land were set on fire.

Third plea: that the land and property were not the plaintiff's. Issue.

There was a verdict for the plaintiff, with \$50 damages, but no certificate for full costs. The Master taxed to the plaintiff full costs. The defendant applied to a Judge in Chambers for a revision, and he referred the matter to the full Court.

In this term November 19, 1878, *McCarthy*, Q. C., obtained a rule *nisi* accordingly.

During the same term, December 7, 1878, *Lount*, Q. C., shewed cause. The question is, whether the plaintiff is entitled to full costs. Under the third plea, that the land was not the plaintiff's, the title to land is brought in question; and the cases shew that where on the pleadings the title to land is brought in question the plaintiff is entitled to full costs. This is expressly so laid down in *Humberstone v. Henderson*, 3 P. R. 40, and this was followed in *Purser v. Bradburne*, 7 P. R. 18, where, under the plea of *non demisit*, the plaintiff was held entitled to full costs. The only case which would appear to weaken the plaintiff's position is *Davis v. Vandecar*, 28 C. P. 185, but this case is not applicable, as it is a decision under the Act 31 Vic. ch. 24, sec. 1, R. S. O. ch. 50, sec. 345.

McCarthy, Q. C., contra. The plea that the land is not the plaintiff's does not necessarily put the title to land in question; but it depends upon what takes place at the trial whether the title comes in question or not. This is the ground of the decision in *Latham v. Spedding*, 17 Q. B. 440. There it was held that it was incumbent on the plaintiff to shew, not merely that the title to land might come in issue by the pleadings, but that it did really and *bonâ fide* come in issue, and that as the title did not come in question at the trial, the plaintiff was not entitled to full costs, and this has ever since been followed as the settled rule in England. In *Hamilton v. Clarke*, 2 P. R. 189, which was a case before the new rules of pleading, when the title to land might come in question under the general issue, the same rule was laid down. The case of *Humberstone v. Henderson*, 3 P. R. 40, is no doubt opposed to this view, but there the title to land did actually come in question at the trial, and the Court is not bound to follow it when opposed to the settled rule in England. Such a plea does not oust the County Court of jurisdiction unless an affidavit is filed with the plea stating that the title to land is in question: R. S. O. ch. 43, sec. 18; *Bailey v. Bleecker*, 5 C. L. J. N. S. 99. The case has been argued as if it were an action of trespass *quare clausum fregit*. Here the action is for negligently setting out fire. The action is purely a possessory one, and the whole object was to try whether the fire took place on the plaintiff's or defendant's land. No question of title to land was ever brought or intended to be brought in question. If it had been intended to bring the title to land in question, the proper plea would have been *liberum tenementum*.

December 27, 1878. WILSON, C. J.—The question is, whether the issue above stated could have been tried in the County Court.

The R. S. O. ch. 43, sec. 18, enacts that County Courts shall not have cognizance of any action "in which the title to land is brought in question."

The words of the English Act 9 & 10 Vic. ch. 95, sec. 58,

are, as to the inferior Courts thereby established, that "the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments * * shall be in question."

In *Latham v. Spedding*, 17 Q. B. 440, the action was brought in the Superior Court for trespass for breaking and entering the plaintiff's dwelling house. The defendant pleaded that the plaintiff was not possessed. The plaintiff got a verdict and damages forty shillings; and Lord Campbell refused to certify that it was a proper case to be tried in the Superior Court.

On motion it was held that the plea of not possessed did not necessarily put the title to the land in issue: that although it might do so, the Judge could not certify, unless, in the language of the Act, the title "*shall be in question*," and as it was not brought in fact into question at the trial, the plaintiff could only recover the costs of an action in the inferior Court: see *Macdougall v. Paterson*, 11 C. B. 755, at pp. 774, 775.

In *Tinniswood v. Pattison*, 3 C. B. 243, the jurisdiction of the County Court was held to be ousted by a plea of cognizance setting up title to the freehold, although no issue was taken on that part of the plea or cognizance.

Hamilton v. Clarke, 2 P. R. 189, follows the English case. In that case, however, not guilty was pleaded as to part, and payment into Court of so much as to the residue. There was no plea of any kind which by pretence could be said to raise a question of title.

In *Humberstone v. Henderson*, 3 P. R. 40, a plea to trespass to the realty, that the land was not the land of the plaintiff was held to raise the question of title.

In *Portman v. Patterson*, 21 U. C. R. 237, in trover for a house—pleas, not guilty, and that the goods were not the plaintiff's—it was held that when it appeared at the trial that the dispute was, whether the house was a fixture or part of the freehold or not, the Judge of the County Court had no power to proceed with the trial.

In an action of trespass for taking away charters con-

cerning the inheritance, such an action concerns the freehold: 2 Inst. 310, 321, referred to in *Tinniswood v. Pattison*, 3 C. B. at p. 248, by Tindal, C. J.

Timothy v. Farmer, 7 C. B. 814, deciding that a plea of not possessed to an action of trespass to land does put the title in issue, is explained by *Latham v. Spedding*, 17 Q. B. 440.

In *Purser v. Bradburne*, 7 P. R. 18, it was held that in an action by tenant against landlord for breaches of covenant, the plea of *non demisit* put the title in issue.

And it is clear by *Taylor v. Needham*, 2 Taunt. 278, 282, that such a plea puts in issue the title of the party as well as the operation of the deed.

In *Morse v. Apperley*, 6 M. & W. 145, the defendant was allowed to plead to an action of trespass to land not possessed, and *liberum tenementum*. The Court said, at p. 149: "It is possible that these pleas may apply to a state of facts constituting one and the same subject matter of defence, but it is also possible that they may apply to a totally different state of facts, constituting a different defence."

In *Slocombe v. Lyall*, 6 Ex. 119, a plea denying the close to be plaintiff's was allowed to be pleaded with *liberum tenementum*, as raising different defences.

Pollock, C. B., said, at p. 120: "The plea of *liberum tenementum* raises a question of title and nothing else. The plea that the close is not the plaintiff's denies his possession as well as title."

Parke, B., said: "Under the denial that the close is the plaintiff's, both possession and title *may* be in issue, which is not the case with *liberum tenementum*."

The pleas of not possessed, and the land not the close of the plaintiff's, are treated as meaning the same thing, a traverse of the possession merely, although the title *may* also, beyond that arising from possession, be gone into at the trial under either of these pleas.

That is the result of the authorities, except the case of *Humberstone v. Henderson*, 3 P. R. 40.

I confess that the case just referred to appears to me to

be the most consistent with reason. If a defendant may, upon an express traverse of the plaintiff's possession of the land, or of the land being his, go into evidence of title as well as of the mere possession, the plaintiff must be prepared to support his title by witnesses and documents at the trial. And after doing so, he is told that his *title* was not meant to be disputed, and will not be disputed, and therefore he must lose all the expense he has gone to in preparing to meet a defence which he dare not have done otherwise than provide against. Besides, possession is not always evidenced by occupancy. In many cases the possession is that which the owner of the land has by virtue of his title deeds, a possession in law only, and in that case the title would strictly and unavoidably be in issue. The difficulty is by virtue of the statute. Can the Judge at the trial certify that the title to the land *is brought in question* when in truth it *is not*, whatever the defendant may have contended?

If the pleas of not possessed, and not the land of the plaintiff's, do not of necessity raise the title, which is the effect of the English authorities, although I must repeat I am neither satisfied with nor convinced by them, then it follows the Judge can determine whether the title was or was not brought in question only by what took place before himself at the trial.

But for many years in this Province, and at any rate ever since the decision of Sir John Robinson, in *Humbertson v. Henderson*, 3 P. R. 40, the practice has been, on a plea that the land was not the plaintiff's, to tax the plaintiff the full costs without a certificate, because by such a plea the title was put in issue on the record; and the plea of not possessed is of the like effect as a plea denying the land to be the plaintiff's.

The original jurisdiction of the County Court did not permit an action relating to land to be tried at all: 2 Geo. IV. ch. 2, sec. 3.

The 19 Vic. ch. 90, sec. 20, gave cognizance to the County Courts of all personal actions in which the damages claimed

were not more than \$200, provided the Court "shall not have cognizance of any action where the title to the land shall be brought in question."

By C. S. U. C. ch. 15, sec. 16, sub-sec. 1, the language is, "Where the title to the land is brought in question," and that is the language of the present enactment.

There is, therefore, a difference in the construction of the statute here from the construction put upon substantially similar language upon the English statute by the English Courts. But we think it better to adhere to our own long established construction and practice; and in my opinion the case of *Humberstone v. Henderson* is not an unreasonable construction to put upon such a plea.

The rule will be discharged, with costs.

GWYNNE, J.—I have for a long time been under the impression that the authority of *Humberstone v. Henderson*, 3 P. R. 40, had been questioned by different Judges in more cases than one since the decision in that case; but I cannot find any such case reported.

If the case was *res integra* I should be of opinion that this plea, regularly pleaded to an action in the County Court would not *ipso facto* exclude the jurisdiction of that Court, nor unless it should appear upon the trial that *in fact* the *title to land* was brought in question; for the plea has a two-fold aspect, and the title need not *of necessity* come in question under it, although it is true the question of title may be entered into under the plea; and if the jurisdiction of the County Court is not excluded by the plea, the plaintiff is not entitled to costs without a certificate.

However, as the point is one only of practice, and I cannot find that any reported case has called in question the judgment in *Humberstone v. Henderson*, I think we must adhere to that decision.

GALT, J., concurred.

Rule discharged.

ROONEY V. ROONEY.

Trinity term—Sittings of the Court dispensed with—When motions for rules nisi to be made—Power of Court.

Held, that although the Court may, by rule thereof, have dispensed with the sittings of the Court during Trinity Term, it is still a term of the Court, and motions for new trials in cases tried at the Summer Assizes at Toronto, &c., must be made during the first four days thereof.

Held, also, that notwithstanding the R. S. O. ch. 50, sec. 284, the Court have power to entertain such motions after the expiration of the four days.

The cause was tried at the last Summer Assizes held at Toronto, before Galt, J., when a verdict was entered for the defendant.

Trinity term began on the 26th of August last. The Court had made a rule that it should not sit during that term.

If the motion for a rule for a new trial should have been made in that term, the last of the four days for making the motion expired on the 29th of August, and no motion was made until the third day of September. During that term, a Judge sat for the full Court during each of the first four days of Trinity term, and heard and disposed of many motions made for rules against verdicts rendered at the previous Summer Assize.

The learned Judge, Mr. Justice Gwynne, when the motion was made before him on the 3rd of September, did not grant the motion, but referred it to the full Court to determine what the practice was in such a case, whether the party had up to the actual sitting of the full Court in Michaelmas term, or only up to such time as the motion must have been made in if the Court had sat in Trinity term.

In this term, November 20, 1878, *O'Donohoe* obtained a rule for that purpose; and also to set aside the verdict, and to enter a nonsuit, or for a new trial, on the ground that the verdict was contrary to law and evidence, and for the rejection of evidence.

In the same term, December 6, 1878, *McMichael*, Q. C., and *Monkman*, shewed cause to both rules. As to the rule on the preliminary objection. The R. S. O. ch. 39, secs. 11, 13, must be read together. The motion was required to be made within the like time as if the full Court had actually sat in Trinity term. By sec. 20, the single Judge sits for the full Court, and by sec. 13, when the full Court does not sit in Trinity term, "any motion for a rule *nisi* for a new trial or nonsuit, or otherwise affecting any verdict which may be rendered at the sitting of *nisi prius* during the Summer Assize, may be made before and heard by the Judge sitting for the full Court during Vacation, under sections twenty to twenty-four of the Act; and the rule, if granted, shall be set down for argument before the full Court in the following term." He referred also to R. S. O. ch. 50, secs. 281, 284, 285, 286, and especially to sec. 298, entitling the party to enter judgment on a verdict or nonsuit on the fifth day of the term next following such verdict or nonsuit: *Re Governors of the College of Christ, Brecknock & Martin*, L. R. 3 Q. B. D. 16.

O'Donohoe, contra. Ssection 13, above referred to, expressly authorizes the motion to be made before the Judge "sitting for the full Court *during Vacation*," and such expression was not intended for a description of the Judge, but as a direction as to the time in which the motion should be made. There clearly should be a new trial on the merits.

December, 27, 1878. WILSON, C. J.—I shall first consider the preliminary objection, because if that is disposed of adversely to the plaintiff there is nothing further to be done upon the rule.

The Judge who sits for the full Court, "shall sit in open Court every week, as well in as out of term, except during the long Vacation, and except during the period from the twenty-fourth day of December to the sixth day of January thereafter, both days inclusive." R. S. O. ch. 39, sec. 20.

When, therefore, section 13 required that a motion for a rule *nisi* affecting any verdict rendered at the Summer sittings of Assize, "may be made before and heard by the Judge sitting for the full Court *during Vacation*, under sections twenty to twenty-four of the Act," it is not by any means clear to me that the words "during Vacation" are descriptive of the Judge who sits for the Court, because they would not be, and are not, a proper *designatio personæ*, inasmuch as he sits "as well in as out of term," or, in other words, he sits as well during term as during Vacation.

The words "during Vacation," it appears to me, refer to the time of the making of the motion rather than to the person before whom it is made. The Vacation referred to cannot mean the period between the end of the Summer Assize in June and the first of July, because there might happen to be no such interval. Nor can it refer to the *long Vacation* immediately following, because it has been specially provided for; nor in strictness can it mean the period of Trinity term, when the Court does not sit in that term, because that time properly is not Vacation at all. The only period left then to meet the time described as *during Vacation*, is that period which is between Trinity and Michaelmas terms.

But there are other sections of the statute which must also be considered before we can determine this point.

In the first place, Trinity term, even when the Court has dispensed with its sittings under the provisions of the Act, is still a *term* of the Court.

It was so held in the case of *Re Moyle and Corporation of Kingston*, 43 U. C. R. 307. There a motion to set aside an award made before Trinity term, was held to have been made too late, when it was not made till after that term had elapsed.

So all process or proceedings which require to be tested in term would, after the beginning of Trinity and until Michaelmas, have to be tested as of Trinity term.

By the R. S. O. ch. 50, sec. 298: "The party in whose favour a verdict has been rendered, or when the plaintiff has been nonsuited at the trial, the defendant may, in

the Superior Courts, enter final judgment on the fifth day * * of the term next following such verdict or nonsuit."

To what day does "the fifth day of the term next following such verdict or nonsuit" relate?

Then by R. S. O. ch. 50, sec. 284, "Motions respecting the trial or verdict shall be made in the Superior Courts within the first four days * * of the term next following the trial."

What term is it that is referred to as "the term next following the trial," when the trial takes place at the Summer Assize?

I think, upon a construction which will make all these enactments consistent, we must hold that Trinity term is the term which is referred to in respect of all causes which have been tried between Easter term and the first of July.

And we think it the most reasonable construction to give to the statute, because if the unsuccessful party could delay moving against the verdict, nonsuit, or assessment given, directed, or made at the Summer Assize until the end of the vacation just before Michaelmas term, the whole benefit and object of the Summer Assize would be lost, for the successful party would, in that case, be no further advanced with his cause than those parties would be whose causes were not tried until the Fall Assizes; and because, also, there would be the absurdity of putting those parties who did not move in such Summer Assize cases until the end of the Vacation after Trinity term, in a better position than those parties would be in who had moved at a much earlier period and had failed in their motions, if we were to construe the statute in the manner the plaintiff's counsel has maintained we should construe it.

We hold that the words "during Vacation" must be used subjectively to the other provisions of the statutes, and that such words may, in a sense, be used as including Trinity term, as the name of *Vacation* is commonly given to those periods of the year in which the Courts do not sit, although it is not very accurately applied in this instance.

We are disposed to give the plaintiff relief in this case, if we can do so in the face of the R. S. O. ch. 50, sec. 284, and consistently with our own general practice in cases of excusable mistake or misadventure.

The section of the Act just mentioned, declares that a motion of this kind "shall be made within the first four days of the term next following the verdict or nonsuit." The language is imperative. Are we obliged so to apply it in a case of this kind? Why such a matter of practice, a mere rule of practice, which had, from the origin of our Courts here up to the time of the revision of the statutes, been regulated only by rule of Court, should have been embodied as a positive enactment in a statute I cannot say, when numerous cases might arise in which it would be the greatest injustice to refuse relief, although the motion had not been made in the first four days of the proper term.

In the time of the Rebellion of 1837, the Court of Queen's Bench, which was sitting at the time, extended the time for hearing motions relating to verdicts, nonsuits, or assessments of damages until the following term. There was also an occasion, before railways were in use here, when the eastern boat was or stages were delayed, and the Court gave further time for such motions; and there have been many indulgences of the kind given at different times for other causes.

Notwithstanding the inexpediency of binding the Court by any such positive rule, we would of course have to conform to it if it be positively binding upon us. That the language is positive enough, we do not doubt. But there are other enactments to be considered in connection with it, and there is also the long established practice of the Court, which subsisted before the revision of the statutes, to be considered, which enabled us to relieve in proper cases.

The Legislature has empowered the Courts, by the R. S. O. ch. 49, sec. 8, to make amendments of every kind "as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the

rights and interest of the respective parties, and of the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case."

By sections 45 to 50 inclusive, the Courts are endowed with the most ample powers to make rules regulating their practice and procedure in whatever manner it may be "deemed expedient for the better attaining the ends of justice, advancing the remedies of suitors, and carrying into effect the provisions of such Acts as aforesaid."

Now it cannot be said in the face of these beneficial and essential powers granted to the Court, and without which we could not accomplish the purpose of our constitution, that we are to be restrained, or that it was ever intended we should be restrained by section 284, before mentioned, from giving relief to a party who has, from some excusable cause, allowed the four days to go by within which he should have moved against a verdict, without his having done so.

We could, I think, pass a rule such as we always had before the revision regulating our practice in that respect; and it would, in my opinion, [giving due effect to the general legislation just stated,] control and overrule section 284 referred to. It certainly was not the intention of the Legislature to establish a new practice by that section, and to abolish our rules upon the subject, and to oblige us to frame our rules afresh if we desired to re-establish our former practice.

We are all of opinion that, reading section 284 by the aid of the other enactments providing for the advancement of justice, the relief of suitors, and the speedy and beneficial determination of suits, that the power of the Court to permit a motion to be made against a verdict after the four days have gone by for moving, upon a case for relief being made by the applicant, has not been taken away, and that we may in such a case permit the motion to be made, and deal with it, notwithstanding section 284 of ch. 50, in like manner as we could have done before the adoption of the Revised Statutes.

The parties were heard upon the merits, and we have considered their arguments and the evidence at the trial; and as we are of opinion there should be a new trial, it is not necessary to say more upon the case.

We grant a new trial, because the defendant's evidence was not given. If it had been, we could have disposed of the case ourselves.

The rule will be absolute, without costs.

GWYNNE and GALT, JJ., concurred.

Rule absolute.

FORTIER V. THE ROYAL CANADIAN INSURANCE COMPANY.

Master and servant—Contract of hiring—Construction.

On 27th November, 1873, the plaintiff, who resided at Toronto, wrote to the president of the defendants' company at Montreal suggesting their entering into the marine business, and offering his services as manager; and on receiving a favourable reply asking what salary he would require, on the 16th December, he wrote stating that he would accept a named sum, and was willing to enter into an engagement for three or five years. On 19th December, the defendants replied stating that they agreed to pay the salary named, "The engagement to be for a period of not less than three years." to which the plaintiff replied accepting the salary and appointment. The correspondence shewed that the plaintiff's duty was to be at Montreal, at which place the plaintiff was to reside, and that the business usually commenced early in the year, at which time the plaintiff suggested their commencing it, and stating that he would then be prepared to begin, and would be down soon after New Year's.

Held, that the proper construction of the correspondence was, that the contract was for three years, and to commence from the beginning of the following year, namely, 1st January, 1874; and that the fact of the plaintiff being paid for a month's services rendered in Toronto at the request of defendants' manager prior to that date, on the basis of the salary agreed upon, could not have the effect of making the contract commence from the first of such prior month, especially when it might reasonably be inferred from the evidence that such services were performed, not under the contract, but with a view of getting it.

DECLARATION.—First count: Setting up a contract of hiring of the plaintiff by the defendants for five years cer-

tain, and a wrongful dismissal by the defendants before the expiration of such five years.

Second count : Alleging a new agreement for two years made at the expiration of a term of three years, during which the plaintiff had been in the service of the defendants, and a wrongful dismissal before the expiration of such two years.

Third count : Upon a new agreement for one year, made after the expiration of the three years of service in the second count mentioned, and a wrongful dismissal before the expiration of such year.

The common counts for work and labour, &c., were added.

Pleas.

To the first, second, and third counts : non-assumpsit.

To the common counts : never indebted, and set off.

The cause was tried before Galt, J., and a jury, at Toronto, at the Summer Assizes of 1878.

The question at the trial turned wholly upon the plea of non assumpsit, which the defendant pleaded to the first, second, and third counts.

It appeared that the contract under which the plaintiff had served the defendants for the three years mentioned in the second and third counts of the declaration arose as follows :—Upon the 27th November, 1873, the plaintiff addressed to the president of the defendants' company a letter of that date, in which, among other things, he said :

“ Sir,—Having had several interviews with Mr. Perry, the manager of your company, and some of your directors, in regard to the marine branch, I have taken the liberty to make application for the management of that branch specially under the direction of your manager and the directors of your board. Having had many years' experience in the management of marine insurance, I feel satisfied I could meet the approbation of your company. If retained for that position, I shall take the earliest opportunity of laying before your board such views as my experience will admit. If your company decide to take up the marine, I would

respectfully suggest that an early intimation be given to merchants of the Provinces. The company will realize their efforts by commencing early in the year to secure the best business."

At a meeting of the board of the defendants' company, held upon the 11th of December, 1873, it was resolved that the company should engage in the marine insurance business provided it was recommended by the president and chairmen of the finance and insurance committees of the board.

Upon the 13th of December, 1873, the president of the company, by a letter of that date, addressed to the plaintiff, replied to the plaintiff's letter of the 27th of November, as follows :

" Dear Sir :—Your letter of the 27th instant duly reached us, but as no action was taken on it by the directors until yesterday, I deferred making any reply. The directors think with me that the marine branch of insurance, more especially the inland marine, may be made profitable, if carefully and cautiously managed, and from enquiry the directors are glad to find that you are in every way qualified to take charge here of that important branch of their business. I have carefully looked over the papers you sent Mr. Perry, and from these it will not be difficult to prepare the necessary books for carrying on the business. It is, however, the desire of the directors not at once to rush into a large business, but to gradually build it up ; and therefore they wish the expenses of management for the first, or perhaps the second year, to be limited to the least possible amount. I would, therefore, like you to say, on receipt of this, what salary you would expect the first year, and what assistance you would require, and the expense of the same. The directors are of opinion that the remuneration should be by salary, and not by any commission on profits. Whatever may be the remuneration in the future to you, their feeling is that the emolument of the officers of the company should progress and increase with the success of the company."

The plaintiff replied to this on December 16th, by a letter of that date, addressed to the president of the defendants' company, as follows ;

"Dear Sir :—Yours of the 13th instant came to hand yesterday, too late to answer by the evening mail. You will kindly accept yourself, and convey to your board of directors, my warmest thanks for their favourable consideration of my application to be appointed to the charge of the marine branch of your company at Montreal.

"In reference to salary, I am willing to enter into an engagement for three or five years, and accept twenty-five hundred dollars for the first year, with such an annual increase to this amount as the board may from time to time consider I am justly entitled to. When you consider that I will have to break up house-keeping, dispose of my furniture at a loss, remove my family at considerable expense, to Montreal, and there re-furnish a house, you will not, I feel assured, look upon the salary I have named as too much. Were I a resident of Montreal I might accept a less salary. Of course the board will easily understand, as business men, that I will require to make an engagement for a certain number of years. This will be as much in the interest of the company as my own. Should I be successful in the management of this branch, of which I have not the least doubt, your board will be glad to retain my services. The expenses of the management I could not at present determine. I would require two clerks, and such other expenses as you are aware it will be necessary to incur in carrying on the business in that branch. This is a matter that I can more clearly explain to you personally when I come down to Montreal, as I do not know what assistance you can give to the marine branch with your present staff of officials. In reference to further details in the management, I will more fully explain it in a subsequent letter."

On the 18th December, apparently, the president drafted a letter, as of the 19th December, in answer to the above letter, and addressed to the plaintiff, as follows :

“Dear Sir:—Your letter of the 13th instant was duly received and placed before the board of directors, at the meeting yesterday, when your view as to salary was duly considered. While the directors are anxious to curtail expenses to the greatest extent possible, yet considering the expense of removing here, they decided on meeting your views to make the salary for the first year \$2,500, the engagement to be for a period of not less than three years. Will you please write me when you propose commencing business; but it perhaps would be best for you to come down, as the details and plan of operations can be more effectually disposed of by a personal interview than by letter.”

Upon the 18th of December, the plaintiff's letter of the 16th, and this proposed answer as of the 19th were laid before the board, when a minute to the following effect was entered:—“Mr. Fortier's letter of 16th instant, and the president's of 19th, were communicated to the board, and the terms of engagement of Mr. Fortier were left to the president to arrange.”

To the above letter of the 19th, the plaintiff replied upon the 22nd of December by a letter of that date addressed to the president, as follows:

“Dear Sir:—Your kind favour of the 19th instant came duly to hand. Kindly accept my thanks for yourself and board of directors for the favourable consideration of my salary and appointment, which I accept. I shall have much pleasure in entering upon my duties at once, and will devote my entire services and best judgment to promote the interests of the company. I have ordered books and blank forms to be got ready at once, so as to be ready for business early in the new year. Will be down to Montreal soon after New Year's.”

The learned Judge held, at the trial, that the contract was for three years certain, but he treated it as having commenced on the 1st of December, 1873, and terminated on the 1st December, 1876; and as there was no new agreement entered into after that so as to affect the company, although the plaintiff rendered some services in December,

1876, and in January, 1877, which were paid for, and the plaintiff having continued to render services until the 14th of February, he nonsuited the plaintiff upon the first, second, and third counts; but he left the fourth, or common counts to the jury, with a direction that if they should find that the plaintiff had rendered services to the defendants with their consent until the 14th of February, and not, as the defendants contended, that he persisted in going to the office contrary to their wishes, after having been informed that the defendants had no further occasion for his services, they should find for the plaintiff for such reasonable amount as they should think fit.

The jury, upon this charge, rendered a verdict for the plaintiff, with \$96 on the common counts.

In Trinity Term, August 29, 1878, *Ferguson*, Q. C., obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial had upon the grounds:—
1. That the evidence shewed that there was a hiring of the plaintiff by the defendants for a period of three or five years, and that the plaintiff was continued in the service of the defendants, without objection, for a period longer than three years, and that such hiring then became a hiring for five years, or, 2. That such continuance of the plaintiff in the service of the defendants, under the circumstances disclosed, operated as a new hiring for the period of two years from the expiration of the said three years, and that the dismissal of the plaintiff by the defendants when and as shewn by the evidence was wrongful, and the plaintiff entitled to recover.

In this term, November 27, 1878, *Robinson*, Q. C., and *J. Stewart Tupper*, shewed cause. The plaintiff claims to be entitled to recover, on the ground that the contract was either for five years, or if for three years only, that on the expiration of the three years there was a further contract for one or two years. The correspondence shews that the contract was to be for three years, and to commence from the 1st January, 1874. The plaintiff's letter of the 16th

December, 1873, contains the offer to serve for three or five years, and the defendants' letter of the 19th December, in reply states that they will engage him for not less than three years, and the plaintiff in his letter of the 22nd December accepts this. This clearly shews a contract for three years certain. There is no evidence of any further hiring beyond the three years. The resolution of the board, passed on the 20th December, 1876, is a clear expression of their intention not to extend the hiring. The mere fact of the plaintiff being paid for a month's service performed before the 1st January, 1874, on the basis of the contract price, would not have the effect of making the contract commence from the 1st of the month previous, namely, 1st December, 1873. There could be no recovery on any implied contract beyond the three years. This would be an executory contract, and to bind the defendants must have been under their corporate seal: *Hughes v. Canada Permanent, &c., Society*, 39 U. C. R. 221; *Wood on Master and Servant*, 190, 265. They asked leave to withdraw the plea of set-off as no evidence was offered under it.

Ferguson, Q. C., contra. There was a contract here for five years. The plaintiff in his letter of the 16th December offers his services for three or five years. The defendants state in their letter of the 19th December that they will accept his services for not less than three years. This does not mean that there was a definite hiring for three years, but merely, as the letter states, that it was not to be less than three, but might be for more. When therefore the three years expired, and the plaintiff continued in the defendants' service, the contract became extended to five years. The proper construction to be placed upon the evidence is, that the contract was to commence from the 1st December, 1873. There is no time fixed for the commencement, and therefore the intention of the parties must govern, and the fact of the plaintiff being paid for his services from that date is clear evidence that such was the intention. Even if it cannot be held to commence from the 1st

December, it must be held to commence from the 22nd December, the date of the plaintiff's letter of acceptance. The resolution of the defendants' board cannot affect the plaintiff, as it was not communicated to him until after that date. In any event there must be held to be a further hiring for at least one year. As to this being an executory contract, and required to be under the defendants' corporate seal, there was no such necessity the contract being one essential for the purposes of the defendants' corporation: *South of Ireland Colliery Co. v. Waddell*, L. R. 3 C. P. 463; *O'Brien v. Credit Valley R. W. Co.*, 25 C. P. 275.

December 27, 1878. GWYNNE, J.—The declaration is not so framed, as it appears to me, as to warrant the raising the point stated in the rule, and which was so ably argued by Mr. Ferguson, for the plaintiff.

The first count alleges a contract for the fixed term of five years, The second, a contract for the specific term of two years, commencing from the expiration of a term of three years, during which, as alleged in the count, the plaintiff had served the defendants; and the third, a contract for the specific term of one year from the expiration of the same period of three years named in the second count.

Now what the rule sets up is, and what Mr. Ferguson contended was, that the original contract under which the three years were served was the only contract, and that it is evidenced by the letters, and as so evidenced it is to be construed as a contract for five years, unless expressly determined at the expiration of the three; or that, at least, if the plaintiff's services were retained under the contract, as he contends they were, beyond the term of three years, then the contract became enlarged for a further period of two years, making in all five years, or at least for a further period of one year. There is no count, as it appears to me, so framed as to support any of these contentions, unless the contract evidenced by the letters be a contract for five years certain.

Whether or not the contract was at all binding as an

executory contract, not having been under the seal of the company, that is to say, whether it was binding without seal under the 31st section of the Canada Joint Stock Companies' Clauses Act of 1869, the provisions of which Act are incorporated with the Act incorporating the company in 36 Vic. ch. 100, D., I do not think it is necessary for us to determine, for I have thought it due to Mr. Ferguson's able argument as to the construction of the contract to consider that point, and I have arrived at the conclusion that the true construction of the contract appearing upon the letters is, to regard it as commencing upon the 1st of January, 1874.

In construing the contract we have to gather the intention of the parties from the letters, interpreted in the light of the surrounding circumstances: *Carr v. Montefiore*, 5 B. & S. 408, 428; *Wood v. Priestner*, L. R. 2 Ex.66; *Kastner v. Winstanley*, 20 C. P. 101.

Now, the surrounding circumstances are: the defendants had not yet embarked in the marine insurance business. The plaintiff's letter of the 27th of November is to advise them to embark in it, and offering his services as an efficient manager of the branch, and he urges them to commence early in the year to secure the best business. This business of marine insurance the plaintiff in his evidence tells us generally commences on the first of the year. We may fairly, as part of the surrounding circumstances, attribute to the defendants' knowledge of this fact. In reply to the president's enquiry what salary the plaintiff would expect, he replies, in his letter of the 16th, that he was willing to enter into an engagement for three or five years, and accept \$2,500 for the first year, with such an annual increase as the board may, from time to time, consider him entitled to, and explains why he asks so much. He says, that if he resided in Montreal he would take less, but that he would have to give up his house at Toronto, sell his furniture, and take his family to Montreal, for the purpose, as is plain, of entering upon his engagement if it should be concluded. The president's letter, of the 13th, had told him that his duties were to be performed in Montreal. He

recognises that fact in his letter of the 16th, in which he points out the loss he would incur selling out at Toronto, and removing with his family to Montreal, to enter upon his duties there. The president's letter, in reply, shews that the board appreciated the force of the plaintiff's observations as to the expense he would incur in moving to Montreal to enter upon his duties. The president, therefore communicates to the plaintiff the willingness of the board to pay him his demand of \$2,500 per annum, and that the engagement should be for a period not less than three years; and he asks the plaintiff to say when he proposed to commence business, no time having been referred to in the correspondence further than the suggestion contained in the plaintiff's first letter, that the defendants, in order to secure the best business, should commence early in the year, when marine business generally begins; to which the plaintiff answers that he accepts the salary and appointment, that he had ordered books in order to be ready for business early in the new year, and that he would be down at Montreal soon after New Year's.

The reasonable construction of this, as it seems to me, is that the plaintiff accepted the appointment for three years, and would be ready to come down to Montreal immediately after the new year, to enter upon the business which then generally commenced, and for which time he had ordered the necessary books. The period between the 22nd of December and the new year was but a short time for enabling the plaintiff to sell his furniture &c., at Toronto, which he had pointed out he would have to do, if he should accept an engagement with the defendants.

The true construction of the contract appears to me to be that it was for three years, to be computed from the 1st day of January then next. The fact that the defendants paid the plaintiff for services rendered by him in the month of December at the rate of \$2,500 per year, makes no difference, for by the contract it is plain that the engagement was to be for three years in full, from some period subsequent to the writing of the letters, so that the plaintiff

could not have demanded pay for the month of December under the contract. Moreover the defendants were never liable to any action at the suit of the plaintiff for services rendered in December, which were rendered at the request of Mr. Perry, and with a view, perhaps, to his obtaining the appointment which he subsequently did obtain. The defendants having, although under no obligation, given to the plaintiff, in remuneration for the services rendered by him at Mr. Perry's request in December, an amount equivalent to what would be a month's salary at the rate subsequently agreed upon, cannot have the effect of making the contract which was concluded by plaintiff's letter of the 22nd December date back to the 1st.

There is nothing whatever in the letters which contain the contract to shew that at the time the contract was being negotiated, the defendants had any knowledge that the plaintiff was doing anything for the defendants or at Mr. Perry's request. The services to be rendered under the contract were clearly contemplated to be rendered at Montreal; and that the contract was intended to take effect from a period subsequent to the 22nd of December, and that such period at the earliest should be the first day of January following, appears to me to be the reasonable construction to put upon the letters, in view of the fact that according to plaintiff's own statement Marine Insurance business did not begin until the beginning of the year, and that the plaintiff, in reply to the enquiry of the defendants' president, when he would be ready to commence, answered in effect, "Immediately after New Year's Day." If this be the true construction of the contract Mr. Ferguson admitted that the plaintiff, cannot recover under any of the special counts, for by a resolution of the board of the 20th December, communicated to the plaintiff by a letter, dated the 26th of December, 1876, he was told that he would cease to fill his position at the end of the year, excepting in so far as it might be necessary for him to bring up the outstanding accounts and statements which the president informed

him he was anxious should be closed with the least possible delay.

For any services rendered after the expiration of the three years for which the contract was entered into, the plaintiff could only recover under the common counts.

The rule to set aside the nonsuit will, therefore, be discharged; and I think there may be inserted in the discharging rule an order that the plea of set-off be struck off the record, as no evidence of set-off was offered at the trial, and if judgment were entered for the plaintiff on the common counts with that plea upon the record, it might operate unjustly to the prejudice of the defendants.

WILSON, C. J., and GALT, J., concurred.

Rule accordingly.

TROTTER V. THE CORPORATION OF THE CITY OF TORONTO.

Water Works Commission of Toronto—Action against City—Limitation of action—Notice of action—35 Vic. ch. 79, O., C. S. U. C. ch. 126, sec. 10.

In an action against the city of Toronto for the non-repair of certain main pipes laid down in one of the streets for waterworks purposes, whereby the plaintiff's premises were injured, it appeared that the action was originally commenced against the Water Works Commission, and that the present defendants were substituted therefor by the Judge's order, but with all the rights and privileges of the original defendants.

Held, that if the action should have been brought against the present defendants in the first place, then by the terms of the said order the action must be deemed to have been commenced against them on the making thereof, at which date it appeared that more than a year had elapsed from the cause of action arising, so that the action would be barred under the 35th section of 35 Vic. ch. 79, O.; but that if the action was properly commenced against the water works commission, then the defendants, being entitled by the terms of the said order to avail themselves of every defence the commission could have had, could set up the want of notice under sec. 28 of the 35 Vic. ch. 79, O., and the C. S. U. C. ch. 126, sec. 10; so that in either event the plaintiff could not recover.

DECLARATION, charging that the defendants, under their statutory powers, constructed, built, and otherwise acquired the possession, management, and control of certain water works for the city, and laid down certain main pipes and appliances through and under a highway known as Front street, at its junction with Simcoe street, and opposite to and in the neighbourhood of the plaintiff's hotel and premises, known as the Marlborough House, situate on the south-east corner of Simcoe and Front streets, in the city of Toronto; and that the defendants did not use reasonable care, skill, and diligence, in the proper maintenance of and keeping in repair the said part of the water works, but on the contrary, &c., that for several months succeeding the first of January, 1875, and up to the time of bringing this suit, great quantities of water were allowed to escape and flow out of the said main pipes into, upon, and around the plaintiff's hotel and premises, and thereby caused great and permanent damage to the same, and deprived the plaintiff of the use of the same, and the plaintiff incurred great expense in endeavouring to prevent the flow of the said water into and upon the said premises, and was otherwise injured.

Pleas: 1. Not guilty. By Statute C. S. U. C. ch. 126, secs. 1, 9, 10, 11, 16, 20, and 35 Vic. ch. 79, O., secs. 1, 2, 21, 25, 28, Public Acts.

2. That the alleged cause of action did not accrue within three months before the commencement of this suit.

3. That the defendants originally named in the writ of summons in the declaration mentioned were the Water Works Commission for the city of Toronto, and not the Corporation of the city of Toronto: that afterwards to wit on the 2nd April, 1878, it was ordered by the Honourable Mr. Chief Justice Hagarty, on the application of the plaintiff, that the said writ of summons and all subsequent proceedings in the suit be amended by substituting the present defendants for the said The Water Works Commission for the city of Toronto, with all the rights of the said original defendants, The Water Works Commission for the city of Toronto; and the said amendment has been made, and the corporation of the city of Toronto have been made defendants herein under the terms of the said order. And the defendants say that the water works in the declaration mentioned were constructed, and the grievances in the declaration mentioned were committed after the passing of the Consolidated Statutes of Upper Canada, chapter 126, and after the passing of the Statutes of Ontario passed in the 35th year of Her Majesty's reign, chapter 79, and by virtue of the said last mentioned Act, and in the execution of the duties imposed by the said last mentioned Act upon the commissioners appointed thereunder; and the said grievances were not occasioned by any negligence on the part of the defendants in maintaining or keeping in repair the water works in the declaration mentioned, or any part thereof, but were occasioned wholly by reason of the improper construction of the said water works in the first place; and the defendants say that no notice in writing of this action was given either to the said The Water Works Commission for the city of Toronto, or to the present substituted defendants, one calendar month before the same was commenced, as required by the

10th section of the Consolidated Statutes first above mentioned.

The cause was tried before Patterson, J. A., and a jury, at Toronto, at the Fall Assizes of 1878.

The order substituting the defendants for the Water Works Commission was as follows:—

“ IN THE COMMON PLEAS.

“ MARY ANN TROTTER, *Plaintiff*.

v.

“ THE WATER WORKS COMMISSION FOR THE
CITY OF TORONTO, *Defendants*. ”

“ Upon reading the summons granted herein,” &c., “ I do order that the writ and subsequent proceedings in the said cause be, and they are hereby amended, by striking out the words, ‘ The Water Works Commission for the City of Toronto,’ and substituting as defendants, ‘ The Corporation of the City of Toronto’; and that both parties be at liberty to amend their pleadings so far as may be necessary to meet the altered circumstances. The new defendants are to have all the rights of the original defendants, and in case it shall be held on objection taken, that the action should have been originally brought against the now defendants, and not against the original defendants, they, the now substituted defendants, shall have the same benefit as regards the limitation of the action as would be allowed them by law if the action had been commenced against them on the date of this order. And I further order that the cost of this application be costs in the cause.”

(Signed) “ JOHN H. HAGARTY, C. J.

“ Dated at Chambers, April 2nd, 1878.”

The facts, so far as material, are set out in the judgment.

The following questions were submitted to the jury:—

1. Was water caused to flow into plaintiff’s house by reason of defects in water mains? Answer. Yes.

2. Was the defect caused or allowed to continue by negligence of the authorities charged with the care of the water works? Answer. No.

3. What damages did the plaintiff sustain by reason of the defect so negligently caused or allowed to continue? Answer. None.

Upon the answers to these questions, the learned Judge entered a verdict for the defendants.

In this term, November 22, 1878, *Bethune*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict should not be set aside and a new trial had between the parties, on the ground that the answers of the jury to the questions submitted to them by the learned Judge were against evidence and the weight of evidence, and against the Judge's charge.

In the same term, December 3, 1878, *C. R. W. Biggar* shewed cause. The plaintiff's witnesses differ in their evidence. Miss Hodgins, the plaintiff's daughter, said the water did not stop running till the latter part of October, 1876, while McLellan, another witness, who was living in the plaintiff's house, said it ceased immediately upon the last repair being made in the pipes on the 28th of September, 1876. There was evidence also to shew the water complained of came from the plaintiff's own rain conductors, and that the cracks in the brick walls came either from original defective work, for which the plaintiff had already been compensated by the contractor; or from some cause other than the alleged flow of water from the water mains. The verdict should not be disturbed upon the grounds stated in the rule, unless upon the clearest case being made for relief by the plaintiff, because the motion is to the discretion of the Court, and there is no appeal: R. S. O. ch. 8, sec. 18, sub-sec. 3; *Hall v. Hamilton*, 24 C. P. 302; *Trumpour v. Saylor*, 1 App. 100. Besides the questions involved are peculiarly questions for a jury, and the Court will not be disposed to interfere unless injustice has been done: *Kenny v. Cook*, 4 U. C. R. 268; *Braid v. Great Western R. W. Co.*, 10 C. P. 137, at p. 152; *Hilliard* on New Trials, 2nd ed., pp. 355, 447, 450. The action was originally brought against the Water Works Commission, and the City Corporation were afterwards substituted as defendants in place of the original defendants, upon the city becoming the proprietors of the works, and assuming the place of the commissioners

under the 41 Vic. ch. 41, O. On that being done, provision was made in the Judge's order directing such substitution, that the city should be entitled to all the rights of the original defendants; and that in case it should be held that the action should originally have been begun against the corporation, and not against the original defendants, (the Water Works Commission), they, the now substituted defendants, should have the same benefit as regards the limitation of the action as would be allowed them by law, if the action had been commenced against them upon the 2nd of April, 1878, (the date of the said order): *Trotter v. Corporation of Toronto*, 28 C. P. 574. If the action, therefore, should have been brought against the city in the first instance, the plaintiff, not having sued within three months, cannot recover by reason of the limitation clause in the R. S. O. ch. 174, sec. 491. If the commissioners should have been sued, their defence by limitation of time is regulated by the 35 Vic. ch. 79, sec. 35, O. If the damage came from the service pipe, the defendants are not liable: 35 Vic. ch. 79, sec. 21, O. And there is evidence that the water, if it came from the city water pipes at all, did not come from the main pipe. McLellan said the water came into the plaintiff's house during and before May, 1876, while, according to Foley's evidence, the main did not break until June. If the city should originally have been sued, the limitation is by the R. S. O. ch. 174, sec. 491. And that clause applies, although the injury has arisen under the Water Works Act. See Consol. Stat. C. ch. 85; *Ridgway v. Corporation of Toronto*, 28 C. P. 579. Section 25 of the 35 Vic. ch. 79, is the only one which empowered the commissioners to sue or be sued, and that is only for the matters therein specially mentioned, and such a claim as this is not one of these matters. The action should therefore have been brought against the city in the first instance, and not against the commissioners: 37 Vic. ch. 75, sec. 6, O.; *Dillon on Municipal Corporations*, 2nd ed., vol. ii., secs. 772, 779; *Mayor, &c., of New York v. Bailey*, 2 Denio 433, 3 Hill 531; *Cowley v. Mayor, &c., of Sunderland*, 6 H. & N. 565, 570; *Scott v. Mayor, &c., of*

Manchester, 2 H. & N. 204. If the commissioners should have been, as they were, sued in the first instance, then the city is entitled to plead the want of a notice of action to the commissioners under 35 Vic. ch. 79, sec. 28, O., in like manner as if the action was still carried on against them : *Cairns v. Water Commissioners of Ottawa*, 25 C. P. 551 ; *Wilson v. Mayor, &c., of Halifax*, L. R. 3 Ex. 114 ; *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62, 81, 87.

Bethune, Q. C., and A. C. Galt, contra. Section 491 of the Municipal Act, does not apply here, as that relates to the non-repair of public roads, streets, bridges, and highways only. A municipal corporation is not entitled to notice of action under the Act which applies to Justices of the Peace : *Hodgins v. Corporation of Huron and Bruce*, 3 E. & A. 169 ; and therefore the defendants can claim no benefit from the 35 Vic. ch. 79, sec. 28, O. That section, by reference to Justices of the Peace, relates only to acts done, while the complaint here is not for anything done, but for neglect to do what should have been done. If the plaintiff would have failed in the action against the commissioners, because of the want of the month's notice of action, that cannot help the city so long as the city is not within the section referred to. That section does not include the corporation of the commissioners, but the commissioners personally, and their officers. See also section 35. In the English cases cited on this part of the case, the words in their statutes are "acts done or *intended to be done*," which are very different from *acts done*, which are the only words of our statute. The escape of water was from the pipes of the company, because the evidence is, that it ceased to flow when their pipes were repaired.

December 27, 1878. WILSON, C. J.—The evidence for the plaintiff must be taken, so far as the defendants are concerned, to limit the alleged injury from the escape of water to the period "between the early part of 1876 and the 28th of September following," as mentioned by McLellan.

He said, in the early part of 1876, they saw water running down from the wall of the coal vault, and they did not know what to attribute it to till in May, after the frost was out of the ground, it shewed itself on the surface. Then he supposed the water pipes had burst. It came from the old pipes, and he said Foley, the employee of the commissioners, told him so. McLellan also said that it was these old pipes which were destroying the house, and that as soon as Foley cut them off on the 28th of September, the water stopped flowing to the house. He also said there was a burst of the new pipes which the commissioners put down, and that there was additional water which flooded the house for a short time, but that it was repaired in a few days. The other water still continued escaping till the 28th of September, since which there has been no escape.

Fanny Hodgins said she noticed the flow of water shortly after they went into the house, and they took possession of it in July, 1874, and they could see it flowing outside the wall. There was a little rivulet of water, quite a large body of water. She summoned experienced people to find out the cause, but they could not find it, and they did not suspect what the cause was till 1876.

If McLellan was there the whole of that time, then the two statements do not agree. He says he was living there between 1874 and 1876. Then he says he went there in the latter part of 1875. But if there had been such a state of things as Fanny Hodgins spoke of, it is strange McLellan should not have known of it till the beginning of 1876. The period before the early part of 1876 is, therefore, not very well supported. If it were better supported than it is, it would not be material in this cause, because it was not shewn the defendants or the commissioners had any notice or knowledge of the escape of water, if there was such an escape, or that they had any cause to suspect it, or that they were guilty of any neglect in that respect. Besides an action for so early an escape as that would be barred by the Water Works Act.

The time must therefore be restricted to that in the early part of 1876 and the 28th of September following.

Foley's evidence is material as to that period, but it is not so precise as it might be. I make out from it that before the 1st of June, 1876, the plaintiff had complained of a leakage from the water pipes, and he, Foley, was told to go and attend to it by one of the commissioners. He went to the place in question on the 1st of June, and he found a leakage there, and he said "none before," which I suppose means he found no escape before that. He does not tell us what he did on the 1st of June, or whether he did anything; but if the ground were dry, as he says he found it on the 15th of June, I suppose he must have done something on the 1st of June. Then he said he did work there on the 15th of June, by making a connection between the new pumping main and the old cement main that had supplied that street for years before that time, and on that day there was no water running at the old cement pipe. The ground was dry there where he dug. In a few days after that the plaintiff was still complaining of the leakage. He examined the place, and he found it was not at the connection of the old with the new pipe—that the work there had been well done; but what else he did, if anything else, he does not say. Then he said on the 23rd of June, (whether that is the time he means by "a few days after" the 15th of June, which he has just mentioned, I cannot say, but I suppose it must be,) the water was running from the pumping main, it would run into the plaintiff's cellar in a stream. The ground where that leak was was wet. The water works were worked for five or six days after discovering that leak, before the works were shut down. Here again he does not tell us what was then done, whether that leak of the pumping main was stopped or not; but McLellan said "they came and repaired that in a few days." So I presume it was repaired, although Foley does not say so. His evidence does not read consecutively as I have given it. Everything is reversed, and nothing is complete or satisfactory, although he must have known

more of these matters than any one else. Then he said he did not do anything from June till the 28th of September, when he cut off all the old pipes which he supposed were leaking. He then found a leakage thereabout; he could not say where it was; it was running into the coal cellar of the plaintiff's house. And the evidence is, there has been no leakage since the old pipes were cut off at that time.

As to the bursting of the new pumping main, it is probable that was repaired as soon as it could reasonably have been done. There does not seem to have been any special complaint about the delay to remedy that.

It would seem from the evidence, which is very confused and has to be extracted here and there to make a connected story, and which even then is a rather imperfect one, leaving much to be inferred and presumed, that from the early part of 1876, down to the 28th of September of the same year, the plaintiff's house was flooded more or less, or perhaps I should say, was affected more or less with water, which there is reason to suppose did escape from the city water pipes in that neighbourhood, and that the plaintiff complained from time to time of the leakage.

It appears also that a leakage, which was discovered on the 1st of June, was stopped: that on the 15th of June, when the ground was dug, there was no leakage found: that on the 23rd of June, there was a leakage from the pumping main, which was soon after stopped; and that on the 28th of September, the old pipes were cut off completely from all connection with the new works. On repairing on the 1st of June and 23rd of June, it was very likely supposed the cause of complaint by the plaintiff was removed. Nothing more was done at the pipes between the time the main pipe was repaired after it was discovered to be leaking, as I make out on the 23rd of June, and the 28th September, and during all that time the evidence is, the plaintiff's house was still affected with water.

I cannot make out that the city in that interval had any notice of the continued leaking. If they had notice and

did not attend to it, that would be evidence of neglect. If they had no notice, it would be a question whether, after their different repairs made, as before stated, they had reasonable cause to believe they had discovered and removed the cause of complaint, or whether they should have done more on these occasions than they did.

I think there was quite sufficient evidence upon which the finding of the jury is based, that the leakage was from defects in the water mains. And there was quite sufficient evidence to sustain the second finding, that the defect was not caused or allowed to continue by negligence of the authorities charged with the care of the water works, because the evidence is, that the persons in charge opened the ground there at different times, and examined and repaired the pipes, as they thought sufficiently to cure the defect, and it is not clear that they neglected at any time to do so unreasonably when called upon. That the cutting off the old pipes in September entirely stopped the leakage, does not of itself shew that the defendants should have done so at an earlier period, and that is the real cause of complaint against the defendants, as it was no doubt the real cause of damage to the plaintiff.

The city unquestionably did not wilfully do the injury. These underground leakages are not always easy to discover, and when one is found it is very likely to be taken as the cause and source of damage, and that seems to have been the case in this instance. The jury were not asked to say whether, upon making the attempts to discover the cause of complaint, the people employed did do all that was reasonable and proper to discover the cause and source of damage; and, if they had, I cannot say the verdict should have been different from what it is. The cellar now, from the evidence, does not seem to be much, if at all, improved in dryness, although the flow of water has long since ceased which escaped from the pipes.

In *Ridgway v. Corporation of Toronto*, 28 C. P. 579, it was held that the city was rightly sued in a case of this kind.

If, therefore, the city were liable, they were not sued (according to the terms of the order of the Chief Justice) until April, 1878, when they were first made defendants, and at that time more than a year had elapsed from the time the cause of action arose to the plaintiff. And it appears to me, notwithstanding the decision of *Hodgins v. Corporation of Huron and Bruce*, 3 E. & A. 169, that the city is entitled to the benefit of that limitation under section 35 of the Act of 1872.

Again, if the commissioners were still the defendants, then the city is entitled by the said order to take the benefit of the want of notice of action to the commissioners, under the 28th section, to which they were entitled; and the judgment on demurrer in this case, 28 C. P. 574, proceeded upon that ground.

The like arrangement, which this order provides for, was made by consent of parties in the case of *Gibbs v. Trustees of the Liverpool Docks*, 3 H. & N. 164, at p. 174. See also the same case, L. R. 1 H. L. 93, at p. 109, on this point.

The third plea in this case was held a good plea, and it was not disproved, or attempted to be disproved, at the trial. The defendants are, therefore, entitled to a verdict upon it.

But as the learned Chief Justice of the Queen's Bench did not speak with confidence upon, and did not distinctly decide in this case, the point whether the city or the commissioners were the body which should be sued, I have examined the merits of the case, notwithstanding the judgment on demurrer.

Ridgway v. Corporation of Toronto, 28 C. P. 579, did decide the city was liable, but not certainly that the commissioners, while in existence, were not liable.

The case of the *Mayor, &c., of New York v. Bailey*, 2 Denio 433, 3 Hill 531, is in favour of the action lying against the city.

The case of *Gibbs v. Trustees of the Liverpool Docks*, 1 H. & N. 439, 448, is in favour of it lying against the commissioners.

On the merits, and also upon the question as to the limitation of action, and the want of notice, I think the rule should be discharged.

GWYNNE, J.—I confine my judgment wholly to the issue joined on the third plea, and the effect of the order in virtue of which the present defendants were made defendants upon the plea of not guilty per statute as regards the time when the action should have been commenced.

By that order the present defendants are made entitled to the benefit of every defence of which the former defendants, the Water Works Commission, could have availed themselves.

Under this order the third plea has been pleaded, which, upon demurrer, has been held to be a good plea in bar, and that judgment has not been called in question.

We have only to deal with the issue in fact which has been joined upon that plea, and it is admitted that this issue can only be found in the defendants' favour. That plea, both in fact and in law, being found for the defendants bars the action.

Then again the order provides that in case the Court should be of opinion that the City Corporation should have been originally made defendants, and not the Water Works Commission, the action against the city is to be deemed to have been commenced at the date of the order on the 2nd of April, 1878, in which case the action was barred by the 35th section of the Act, so that whether the Water Works Commission were or not properly made defendants originally, the present defendants are entitled to our judgment.

GALT, J.—I express no opinion on the merits of the case, but I concur in that part of it which relates to the protection the defendants are entitled to under the statute, and by the terms of the order of the learned Chief Justice.

Rule discharged.

SANDERSON V. DIXON.

Insolvency—Omission of plaintiff's name in statement—Supplementary list—Composition and discharge—Necessity of assent of both partnership and individual creditors.

To an action of covenant contained in a mortgage the defendant pleaded a discharge in insolvency under a deed of composition and discharge, but to which the plaintiff was no party. Neither the plaintiff's name nor debt were mentioned in the sworn statement exhibited at the first meeting of creditors, nor was there any supplementary statement, as provided for by the Act, subsequently furnished containing any such reference, but it was urged that a couple of lists containing very indefinite references thereto, and furnished to the assignee prior to the meeting, and from which the sworn statement was made, might be deemed to be such supplementary statements.

Held, that they could not be so considered, and more especially so, as it appeared from the evidence that the plaintiff's name and debt had been intentionally omitted from the sworn statement.

Quære, whether in a deed of composition and discharge, where there are partnership and individual creditors, there must be a consent of the necessary number and value of each class to constitute a valid discharge.

THIS was an action on a covenant contained in a mortgage, dated 5th of March, 1877, for payment by defendant to plaintiff of \$1,739.94, with interest at eight per cent., in the manner following, that is to say: \$639.94 on the 10th of March, 1877, without interest; \$600, with interest at eight per cent. from the date of the deed on the whole unpaid sum, on the 1st of July, 1877, and \$500, with interest at eight per cent. from the 1st of July, 1877, on the 10th of March, 1879; and that on default of payment of the interest secured, the principal money should become payable; alleging as a breach that the defendant had only paid the sum of \$639.94.

Pleas: 1. *Non est factum*.

2. That the defendant did not covenant as alleged.

3. Payment.

4. That after the accruing of the plaintiff's claim the defendant became insolvent, and the defendant made an assignment under the Insolvent Act of 1875: that the defendant procured the due execution of a deed of composition and discharge by a majority in number of the

creditors of the defendant, who had proved claims to the amount of \$100 and upwards, and who represented three-fourths in value of all the claims of \$100 and upwards which had been so proved. And all things happened, and all times elapsed, to entitle the defendant to the order confirming the said deed of composition and discharge. And the Judge of the County Court of the County of Peterborough, afterwards, and before the commencement of this suit, duly allowed and granted to the defendant an order confirming the said deed of composition and discharge, whereby the defendant was discharged from the said claim of the plaintiff, and the said order is still in force. And the plaintiff's claim was mentioned and set forth in a list of creditors furnished by the defendant as such insolvent to his assignee, previous to the execution of the deed of composition and discharge, and in time to admit of the plaintiff obtaining the same dividend or composition as other creditors upon the defendant's insolvent estate.

Issue.

The cause was tried before Gwynne, J., without a jury, at Peterborough, at the Fall Assizes of 1878.

The covenant was admitted, and the defendant entered upon his case.

James A. Hall, the official assignee, was called. He said : John Dixon, the defendant, and his brother William, executed the deed of assignment to the witness on the 31st of August, 1877. The insolvents filed a list the day of the first meeting. I had a list before. I produce a printed list which I made myself from information given by the insolvents, and this is the list I sent to the creditors before the first meeting. I mailed it to them on the 7th September, 1877. At that time the insolvents had only given me information from which I made the list. They gave me no list. At the first meeting they filed a sworn statement of assets and liabilities. This is it. The name of the plaintiff does not appear in this list. Nor does the property appear in it or in any list. I find a further list among my papers in William Dixon's hand-writing.

I think they produced this at the first meeting, and that they then made the sworn list from it. It is there entered. "There is a covenant in a mortgage to F. Sanderson, for which we may be liable, say \$500." In the minutes of the first meeting it is entered that the plaintiff was there represented by Mr. Dennistoun. I have a statement made by Philip Ross, who attended the first meeting on behalf of many of the creditors. He made up the list in my presence in Dixon & Brother's shop immediately after the meeting. It was taken for his information, and I asked for a copy and he gave me one. In Ross's statement it is entered, "F. Sanderson estimates that he will have, when the property is sold, a claim for about \$500 over his mortgage." There are other names than Sanderson's, not in the sworn statement of the insolvent, which do appear in the papers from which I think the sworn statement was made up. The sworn statement was in a blank form, which was filled up, as I think, in my office from the other, and both left with me, although I only marked the sworn statement as filed.

Cross-examination.—The sworn statement is the one I went by. No other supplementary list was afterwards furnished to me. I can only account for the other unfiled document being among my papers from the defendant not having taken it away. It contains every note on which they were liable, and this amount of \$500 set down to Sanderson. I did not send the first notice to Sanderson, nor do I think I sent him any other.

Re-examination.—I have another list also among my papers not filed. I think it came to my hands in the same way as the other unfiled one. I think it, also, and the sworn statement, came to me together. It seems to be the same as the other. This was also before Ross, and was on the table at the first meeting of creditors, but I think the sworn statement was the only one the creditors looked at. The filing of the sworn statement was the first thing done at the meeting. The sworn statement was made up at the table in the presence of the creditors from the other papers,

and we waited half an hour for it. I wrote part of it myself to expedite matters. The insolvents were not examined. They were there, and might have been examined if the creditors desired.

Wm. Dixon said : I am one of the insolvents. I furnished statements to the assignee at different times. This paper produced is in my handwriting. A copy of it was furnished, I think, before the sheriff sent the first notice. The plaintiff's name as a creditor is not in it. Marked A. [This was not among the papers.] This one now produced, taken from the papers produced by the assignee, marked B., was furnished, I think, after the first meeting. Up to that time I had considered the mortgage good for the debt, and that was the reason it was not put in the statement. I spoke to the assignee about the claim several times, and he did not seem to know what to advise me in the matter. The mortgage was to secure money lent to the Dixon estate, of which the firm formed a part. The firm was indebted to the estate and so gave the mortgage. The mortgaged land was the property of the firm, but the legal title was in John's name only, and the plaintiff knew it was partnership property when he took the mortgage.

Mr. Dennistoun said he did not attend the meeting on behalf of the plaintiff, but of other creditors : that after the assignment the plaintiff consulted him, and he advised the plaintiff to take no part as a creditor, and, acting on that advice, the plaintiff took no part so far as the witness knew. The plaintiff lived in Peterborough, and knew of the insolvency.

The plaintiff's mortgage was admitted to be a second mortgage. The claim of the first mortgagee was not entered in any list.

It was objected, among other grounds taken at the trial on the part of the plaintiff, that the assignment was only for partnership debts, while the mortgage shewed the debt was the personal debt of John Dixon, the defendant, and that William Dixon, the other partner of the firm, was only a surety for his brother for the payment of that debt.

The learned Judge, after reviewing the evidence and exhibits, found as follows :—

1. That the mortgage executed by John Dixon to the plaintiff was a second mortgage, the legal estate in which property was, at the time of the insolvency, vested in a first mortgagee, which first mortgage claim was never entered in any list.

2. That the plaintiff, although from the circumstance of his living in the same town with the insolvents, he was aware of the insolvency of the firm, had no notice given to him by the assignee of any of the proceedings in insolvency, and was not treated as a creditor of the insolvents in that insolvency.

3. That the plaintiff's claim constituted a claim against the separate estate of John under the covenant as principal, and against William under the covenant as surety only, and that no such claim was entered either in the sworn list furnished to the assignee, or in any subsequent list furnished to him under the provisions of the Insolvent Act.

4. That no list of separate creditors of the insolvents was ever furnished to the assignee.

5. That no deed of composition and discharge, executed by any separate creditors of the insolvents, was produced or proved.

The plaintiff therefore is, I think, entitled to a verdict for the principal sum of \$1,100 and interest, from the 10th of March, 1877, at 8 per cent. to November, 1878, \$151, \$1,251.

The verdict was entered accordingly.

In Michaelmas term, November 20, 1878, *Hector Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict entered for him should not be set aside, and a verdict entered for the defendant, pursuant to the Law Reform Act and the Law Reform Amendment Act, on the ground that, on the law and evidence, the defendant was discharged from the liability to the plaintiff sued for in this action, and on

the ground that the separate creditors of the insolvent were included in the schedule of creditors and other insolvent proceedings, as shewn by the affidavit filed.

The affidavit filed by the defendant's attorney, stated that John and William Dixon individually, and as trading under the name of Dixon Brothers, made an assignment under the Insolvent Act of 1875, and amending Acts: that the several lists of creditors furnished to the assignee by the defendant and his partner, contained the names and particulars of a number of individual creditors, and their claims against each of the insolvents: that he attended the meeting of creditors called to take into consideration the deed of composition and discharge: that he and the assignee then examined all the claims filed, both individual and firm claims, and found that the deed had been executed by the required proportion of both individual and firm creditors—at that meeting one resolution, approving of the deed, was moved and seconded by individual creditors and another resolution by firm creditors, and both resolutions were carried unanimously: that the names of George Scott, Robert Darling, John Galvin, John Fowler, and William Grant, appeared in the sworn and other lists of creditors furnished by the insolvents to the assignee. Some of these persons were individual creditors of both William Dixon and John Dixon, but he could not state positively from memory against which one of the insolvents each of these creditors proved. All these persons but John Galvin stood in the same position as the plaintiff prior to the execution of the mortgage sued on, and the liabilities were incurred on behalf of the Dixon estate.

On shewing cause in answer to that affidavit the affidavit of the plaintiff's attorney was read, to which was attached the copy of a letter from the defendant's attorney, who made the preceding affidavit. It was dated the 23rd of April, 1878, and was an answer to a letter of the plaintiff's attorney, stating that he was going to take proceedings against the defendant and his brother on the mortgage. The defendant's attorney wrote as follows: "I am much surprised that Mr. Sanderson should now take

any action of this kind after his name was left out of the list of creditors with the intention that he should lose nothing. By merely inserting his name in the list of creditors he could have been compelled to accept his land security or prove against the estate of Dixon Brothers, and abandon his security as to that amount. It was not desired to put an old friend and neighbour in that position, and I don't think Mr. Sanderson should now take the action you propose in your letter."

During the same term, November 29, 1878, *J. K. Kerr*, Q. C., shewed cause. [After reading the affidavit as above.] Of all the schedules of creditors' names produced at the trial, the only one available to the defendant or affecting the plaintiff, is the sworn list read and acted upon at the first meeting of creditors. The assignee distinctly stated that was the only one which was acted upon and filed, and that the sworn statement was made up from one of the lists which had before that been furnished to him. The plaintiff's name or claim is not in the sworn list in any form, and the assignee said he never sent any notices to the plaintiff, and he had no occasion to do so, because the plaintiff's name was not on the list.

The way the claim is mentioned in two of the other lists which were never sworn to or acted upon as stated in the evidence, does not describe this claim correctly. In one paper it is entered, "Covenant in mortgage to F. Sanderson, \$500," without stating the name or names of the covenantors, but leaving it to be inferred it was a partnership debt, and without stating the amount correctly, which was then \$1,100 principal. In the other paper the claim is referred to in this way: "There is a covenant in a mortgage for which we may liable, say \$500." That is equally objectionable. There was also a third paper, exhibit A., [not among the papers,] in which this claim was not referred to at all. The evidence given at the trial, and the letter of the defendant's attorney now filed, shew that the plaintiff's claim was purposely omitted from the sworn statement, and that puts an end to any use which is now attempted to be made of the other statements: *Palmer v.*

Baker, 22 C. P. 59; *Loomis v. Ballard*, 7 U. C. R. 366; *Clarke* on Insolvency, p. 193, sec. 61 of the Act of 1875, p. 111-23, secs. 17-23; *Robson v. Warren*, 6 U. C. L. J. N. S. 14; *Standard Bank v. Johnson*, 42 U. C. R. 16, 21. This was not a partnership debt, but the separate debt of the defendant as the principal debtor, and of his co-partner as surety. The debt, as mentioned in any of the lists objected to, is described as a partnership debt, which would prevent its binding the plaintiff: *Pidgeon v. Martin*, 25 C. P. 233. Where a deed of assignment is made by a partnership, the statute applies to several as well as joint property: *Re McLaren*, 1 App. 68; *Re Walker*, 2 App. 265; *Ex parte Philips*, *In re Moore*, L. R. 19 Eq. 256.

Hector Cameron, Q. C., contra. The plaintiff's name, although not in the sworn list, was contained in a list from which the sworn list was made up. That original list was in the possession of the assignee throughout the insolvency proceedings. It may be considered as a supplementary list, and that it was not sworn to is of no consequence, as the statute does not require the supplementary list to be under oath: sec. 23. The assignment extends to separate as well as to joint creditors, and the joint and separate estates are assigned. The assignee's certificate to the County Court Judge, does not distinguish between joint and separate creditors. He referred to *Rooney v. Lyons*, 2 App. 53; *Farrell v. O'Neill*, 22 C. P. 31; *Cameron v. Holland*, 29 U. C. R. 506; *Preston v. Hunton*, 37 U. C. R. 177.

December 27, 1878. WILSON, C. J.—The Insolvent Act itself decides this case. By sec. 17, the insolvent must, within ten days after the assignment, furnish to the assignee a correct statement of all his liabilities, direct or indirect, contingent or otherwise, indicating the nature and amount thereof, together with the names, additions, and residences of his creditors, and the securities held by them, in so far as may be known to him, and he may correct or supplement the same.

And by section 23, the insolvent, who is bound to attend at the first meeting of his creditors, and after making such corrections as he may deem proper to his statement of liabilities, is to attest the same under oath.

In this case the assignee, whether procured by himself or furnished by the insolvents, had a statement of the insolvents' affairs before the first meeting of creditors was held. He had, I may say, two such statements; in one the plaintiff's name or debt was not mentioned; in the other it was in the insufficient manner before stated.

At the first meeting of creditors the statement was made up from one or other or both of the statements just mentioned, and in it the plaintiff's name and debt were not contained, described or referred to. And no supplemental statement has been furnished since then.

It is useless then to say that the plaintiff is barred from the recovery of his debt against the defendant by reason of his discharge, when section 61 permits the discharge to operate only upon or against liabilities "which are mentioned or set forth in the statement of his" (the debtor's) "affairs exhibited at the first meeting of his creditors, or which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge, and in time to admit of the creditors therein mentioned obtaining the same dividend upon his estate, or which appear by any claim subsequently furnished to the assignee."

It was argued strenuously that the statements given to the assignee before the first meeting of creditors, and from which the sworn statement was made, were supplementary statements.

Instead of being supplementary to the sworn statement, they were superseded by the sworn statement, which was substituted for them "after making such corrections as they deemed proper" in the other statements.

And this argument is urged upon us in order to bar the plaintiff from the recovery of his debt, when one of the partners, the brother of the defendant, and the surety for

this debt, swore at the trial, "I had considered the mortgage good for the debt, and that was the reason it was not put in the statement;" and when their attorney has declared in writing that the plaintiff's "name was left out of the list of creditors with the intention that he should lose nothing," it is surely going too far to ask us to stultify the two partners and their attorney by holding that the plaintiff's name, which is not in the sworn statement, and was purposely omitted from it, shall be considered as having been there all the time.

We shall not do that, because, firstly, it would be contrary to the fact; and secondly, because it would be contrary to the sworn and express declaration and intention of the parties.

It was said this was a partnership debt. The evidence shews the plaintiff had a claim upon the Dixon estate—not the estate of these partners, but an estate "of which the firm formed a part."

What I suppose was meant was, that the two brothers composing the firm had some dealings with that estate, but whether as partners or as individuals does not appear. However that may have been, it was said "the firm was indebted to the estate, and so gave the mortgage" to the plaintiff. The plaintiff had no previous dealings with the partnership. The firm became indebted to him by assuming for the Dixon estate the debt which that estate owed to the plaintiff.

The plaintiff's remedy against the defendant and his brother, who was his co-partner, is in and upon no other instrument and upon and in respect of nothing else than the mortgage in question which was given to him. And by that the defendant is the principal debtor, and William Dixon is the surety only.

It was a separate claim as against them from the first, and it is so still.

It is not necessary to consider whether a deed of composition and discharge must, when there are joint and separate creditors, have the assent of the necessary num-

ber and value of each class of claims to constitute a full and perfect discharge. I think myself it is quite clear there should be.

I am of opinion the rule should be discharged.

GWYNNE and GALT, JJ., concurred.

Rule discharged.

INGLIS V. THE WELLINGTON HOTEL COMPANY.

*Agreement to pay for work in shares of a company—Validity of—Interest—
C. L. P. Act, R. S. O. ch. 50. sec. 267, subsec. 2.*

The plaintiff performed certain work, amounting to \$465, for defendants, a joint stock company, incorporated under R. S. O. ch. 150, under an agreement for payment in shares of the capital stock of the company.

Held, that the agreement was not *ultra vires* of the company: and that the plaintiff's acceptance of the shares under such agreement would not render him liable to pay the amount thereof to creditors of the company.

Held, also, that the plaintiff could not sue on an implied assumpsit to recover the value of the work so performed in money, unless it was shewn that the defendants were unable or had refused to deliver the shares.

Under sec. 267, sub-sec. 2 of the C. L. P. Act, R. S. O. ch. 50, where a claim is payable otherwise than by a written contract, interest may be allowed from the date of a demand therefor in writing.

Where interest was claimed on a sum of \$96, admitted to be due before action commenced, for extra work and materials furnished by the plaintiff, but not under a written contract, and no demand of interest was proved:

Held, that the claim for interest could not be allowed.

ACTION on the common counts. Plea: Never indebted.

The cause was tried before Armour, J., without a jury, at Guelph, at the Fall Assizes of 1878.

The amount of the plaintiff's claim was \$558.65. As regards \$465 of this amount, there was no dispute as to the facts. The plaintiff did certain work for the defendants on an agreement that he was to be paid in shares of the capital stock of the company. The value of the work amounted to \$465.

The plaintiff contended that the agreement was *ultra vires*, as respects the defendants, and consequently that he was not bound to accept shares; and further, that as the shares were in sums of \$200, they could not be apportioned to cover a sum of \$465.

There was no dispute as to the plaintiff's right to recover the principal sum of \$93.53, but the whole question was, whether the plaintiff was entitled to claim interest on that amount. The defendants admitted that this sum was due in August, 1876, and that it had not been paid through inadvertence.

The learned Judge entered a formal verdict for the defendants, with leave to the plaintiff to move to enter a verdict for him for such amount as the Court might think proper.

In this term, November 19, 1878, *McCarthy*, Q. C., obtained a rule calling on the defendants to shew cause why a verdict should not be entered for the plaintiff for the sum of \$558.65, together with interest on \$93.65, part thereof, from the 21st August, 1876, and for \$465, residue thereof, from the first day of April, 1877, or for so much thereof as to the Court might seem meet, pursuant to leave reserved, on the grounds: 1. As to the \$93.65, together with interest thereon, that the defendants admit their liability therefor, and there is no dispute as to the same. 2. As to the balance or sum of \$465, that the plaintiffs did the work for the defendants, for which the defendants agreed to pay them in shares of their capital stock; but that such an agreement was *ultra vires* on the part of the defendants' directors, and would not have operated as a payment of the stock if the plaintiffs had subscribed therefor; the plaintiffs never did subscribe or become shareholders in the company, and could not therefore be paid in that way; and because the defendants' shares being in sums of \$200 each, they could not pay the odd sum due to the plaintiffs by shares of the defendants.

During the same term, November 28, 1878, *Guthrie*, Q. C.,

shewed cause. The first question is as to the claim to the interest on the \$93.65. This is governed by the R. S. O. ch. 50, sec. 267, sub-sec. 2, which permits the allowance of interest only where there has been a demand in writing, and there has been no demand here. The next question is as to the plaintiff's right to recover \$465, on an implied assumpsit to pay for the value of his services in money, on the ground that the special agreement for the payment in shares of the company is *ultra vires*. There is nothing to prevent the company accepting in payment of the shares the value of the plaintiff's services which have been actually rendered. On the delivery and acceptance of the shares what takes place, amounts to a payment in cash. All that is necessary is, that there should be what in law constitutes a payment. No action would subsequently lie against the plaintiff for their value, for the plaintiff would always be entitled to set this up as a defence. The defendants' Act of Incorporation, R. S. O. ch. 150, sec. 53, sub-sec. 2, expressly provides for such an arrangement being made, and the English cases shew that it is perfectly valid: *Brice* on *Ultra Vires*, 2nd ed., 358, 767, 769. The defendants could not raise the objection of *ultra vires*, for they have received the full benefit of the plaintiff's services: *Clark v Sarnia Street R. W. Co.*, 42 U. C. R. 39. Moreover, the plaintiff acquiesced in the transaction, for after the agreement was made and the work performed, he attended two meetings of the company, and acted as a shareholder: *Brice* on *Ultra Vires*, 2nd ed., 353. The next point is, that the directors cannot sub-divide the shares, but section 15 of the Act expressly empowers them to do so. To entitle the plaintiff to recover, he must prove that he demanded the shares, and that the defendants refused to deliver them.

McCarthy, Q. C., contra. The plaintiff is entitled to the interest claimed. The principal amount was admitted to have been due in August, 1876, and that it was not paid through inadvertence. The statute does not make a demand essential. The jury are permitted to allow interest as damages. As to the \$465. The question is, was there a

good contract or not? If the contract was good, no doubt the plaintiff cannot recover on an implied assumpsit unless he shew that he demanded the shares, and that the defendants refused to deliver them. But if it is not a good contract; if it is *ultra vires* of the defendants, and therefore void for want of mutuality, then the plaintiff having done the work, [and the defendants having received the full benefit of the plaintiff's services, the plaintiff is entitled to recover the value of such services on a *quantum meruit*. Section 42 of the Act R. S. O. ch. 150, shews that the agreement could not be made. Sub-section *c* provides only for an actual payment in cash for shares. The decisions since the Imperial Act of 1867, cannot govern this case, as they are based upon an express provision of the statute requiring such an agreement as this to be filed with the share list, but they may be looked at as containing remarks on the law before the passing of the Act: *Andres's Case*, L. R. 8 Ch. D. 126; *Pagin & Gill's Case*, L. R. 6 Ch. D. 681; *Blythe's Case*, L. R. 4 Ch. D. 140; *Cleland's Case*, L. R. 14 Eq., 387; *Spargo's Case*, L. R. 8 Ch. 407. The English cases before the Act clearly shew that such a contract is *ultra vires*, and that the plaintiff, if he accepted the shares, would still be liable to a creditor: *Elkington's Case*, L. R. 2 Ch. 511; *Pellatt's Case*, L. R. 2 Ch. 527. The next objection is, that the contract is void for uncertainty. There is no mode of sub-dividing the shares. Section 15, on which the defendants rely, does not apply to a sub-division of one or two shares, but refers to a general sub-division of the whole of the shares of the company: *King's Case*, L. R. 2 Ch. 714, 719.

December 27, 1878. GALT, J.—There is no dispute as to the facts of this case. The plaintiff did the work covered by the \$465, on the agreement that he was to be paid in shares.

Mr. McCarthy argued that such an agreement was *ultra vires* as respects the defendants, and consequently that the plaintiff was not bound to accept shares.

There is nothing in ch. 150 of the R. S. O., which forbids such an arrangement. But he contended that a person entering into such an arrangement would remain liable on his shares to a creditor, and that the directors could not relieve him from such responsibility, in support of which he cited *Elkington's Case*, L. R. 2 Ch. 511. That case, however, differed essentially from the present. The Elkingtons had actually subscribed for 150 shares and made a payment thereon, and received the share certificates, and were entered on the register as shareholders in respect of them. The claim made was not made by the company, but by the liquidators. The question there was, were the Messrs. Elkingtons actually shareholders in *presenti*, and the Lord Justices were unanimously of opinion that they could not be so regarded.

Pellatt's Case, which arose out of the same liquidation, namely, *In re Richmond Hill Hotel Company*, reported in the same volume, p. 527, was also quoted by him; but in that it was held that a person who agreed to take shares and to set off calls in payment for goods, was not liable to be placed on the list of contributories.

Turner, L. J., in giving judgment, says at p. 532: "On this two questions arise: (1), was it within the powers of the directors to enter into such an agreement with Pellatt so as to bind the company? and (2), if it was, what was the result of the stipulations on the part of the company becoming incapable of being performed? On the first question, I do not mean to go the length of saying that in no case, and under no circumstances, can the directors enter into a contract with a tradesman, who undertakes to supply goods to the company, that the price of the goods shall be set off against the calls upon shares taken by him. Possibly such a contract may, in some cases, be capable of being entered into. But in ordinary cases such a contract would, in my opinion, be *ultra vires*, because it alters the tradesman's position as a shareholder from his position as defined by the Companies Act."

It is to be observed that in *Elkington's Case*, the decision

proceeded on the ground they were actual subscribers, with a certain amount remaining unpaid on their shares, whereas in *Pellatt's Case* he was held not to be responsible, because he was not an actual shareholder.

Both, however, differ materially from the present. The plaintiff was not a shareholder, nor was it his intention, or that of the defendants, that he should be so until his contract was completed, when he was to be paid by shares in the capital stock.

In *Spargo's Case*, L. R. 8 Ch. 407, it was held that a shareholder was not liable to be made a contributory, when in fact his shares had been really paid in full, although not in money.

Mellish, L. J., says, at p. 414, "Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side and sums to an equal amount due on the other side on that account, and these accounts are settled by both parties, it is exactly the same thing as if the sums on both sides had been paid."

Applying that principle to the case before us, it is plain that if an amount of paid-up shares had been transferred to the plaintiff equal to the amount of work done, no creditor of the defendants could have made any demand on the plaintiff treating such shares as unpaid.

When we are called upon to set aside this contract as being *ultra vires* on the part of the defendants, we must bear in mind that this action is not based on an executory, but on an executed consideration, and that the defendants are ready and willing to perform their part of the agreement, and there is no legal objection to their so doing. The plaintiff admits that he was to receive payment in paid-up stock of the company, and the defendants are prepared to carry out the arrangement. I see no reason for interfering with the verdict on that head.

As to the question respecting the amount of the shares, namely, that as the shares were in sums of \$200, they could not be apportioned to cover a sum of \$465, we are not called upon to express an opinion. This action is on

the money counts, claiming payment in money for work done. The answer is, we never contracted to pay you in money, and as this plea is proved, and, as I have shewn, there was nothing illegal in the arrangement, the verdict for that should remain for the defendants.

There is no dispute as to the principal sum of \$93.65, but the plaintiffs claim interest thereon.

The claim is based on extra work and material furnished by the plaintiffs. No demand for payment of this sum was ever made before this action was brought, nor did the defendants dispute their liability to pay it.

By sub-sec. 2 of sec. 267 of the Common Law Procedure Act, R. S. O. ch. 50, it is enacted, that a claim, "If payable otherwise than by virtue of a written instrument at a certain time, the jury may allow interest from the time when a demand of payment is made in writing, informing the debtor that interest will be claimed from the date of such demand." No such demand or notice was made or given in this case, therefore interest should not be allowed.

The rule will be absolute to enter a verdict for the plaintiff for \$93.65.

GWYNNE, J.—The plaintiff having performed the work sued for, upon a special agreement for payment in shares, cannot sue upon an implied assumpsit, unless it should appear that the defendants are unable or unwilling, and have refused to pay in the manner specially agreed upon. The burthen which might become imposed upon a person, consequent upon his accepting payment in a particular manner agreed upon by him, could not relieve him from the terms of his agreement; but here the burthen suggested is, as it appears to me, quite visionary. The suggestion is, that if the plaintiff now, in fulfilment of the agreement upon the faith of which he was employed to execute and did execute the work, should accept shares in the defendants' company to the amount of his demand for the work done, he might still hereafter be liable to creditors of the company to pay the full amount of the shares

over again. In *Fothergill's Case*, L. R. 8 Ch. 270, no question was raised as to the 5,000 fully paid-up shares in a company, given as part of the consideration of a mine transferred to the company.

By the Companies Clauses Act of 1857, in England, it is provided that such contracts shall be registered in order to relieve the parties contracting to take paid-up shares under such circumstances from the claims of creditors; but in our Act there is no such provision, and in the absence of an enactment prohibiting the transaction or prescribing the manner in which it may be effectuated, there is nothing to prevent parties making such contracts: *Burkinshaw v. Nicolls*, L. R. 3 Ap. 1005, 1015-6. It is quite common for persons to sell property to a company upon an agreement to receive payment in paid-up shares of the company, as to the whole or as to part, and it was as competent for the plaintiff to agree to sell his labour as any other property for such consideration. There being nothing in the Act prohibiting such a contract, it was perfectly legitimate and proper.

Elkington's Case, and cases of that class, where the shares were subscribed for, but the consideration agreed to be taken by the company in lieu of cash or by way of set-off against future calls was never given, have no bearing upon the case before us.

In so far, therefore, as relates to the work done by the plaintiff, under the special contract for payment in fully paid-up shares, this action cannot be maintained.

WILSON, C. J., concurred.

Rule accordingly.

PERKINS V. BECKETT ET AL.

Promissory note to insolvent—Action by endorsee—Right to recover.

The defendants, in ignorance of one P. being an undischarged insolvent, made a promissory note to him, which P. endorsed for value to the plaintiff, who was fully aware of P.'s insolvency. In an action by plaintiff against defendants :

Held, that he was entitled to recover.

Per WILSON, C. J., and GALT, J.—The maker of a note to an insolvent is presumed to guarantee his capacity to endorse it over, and in an action on the note by such endorsee, in the absence of intervention by the assignee, is estopped from denying his right to do so; and the endorsee's knowledge of the insolvency will not prevent such estoppel from applying.

Per GWYNNE, J.—The right to sue does not arise in such case on the principle of estoppel, but because an undischarged insolvent, notwithstanding that the Insolvent Act vests all the after-acquired property and contracts in the assignee, has still an interest therein, in respect to which either he or his transferee may maintain an action against all the world except the assignee; and a defendant thus sued may protect himself against an after suit by the assignee by giving him notice of the action brought against him.

THIS was an action on a promissory note by the plaintiff as endorsee against the defendants as makers thereof, payable to one E. L. Perkins.

The defendant pleaded twelve pleas, but the only ones material are the third, sixth, and ninth, and which are as follows :

Third plea : That the plaintiff was not, at the commencement of this suit, the lawful holder of the note.

Sixth plea : That the defendants were induced to make the said note through the fraud of the said E. L. Perkins, (the payee), and the said promissory note was overdue when the same was first endorsed to the plaintiff.

Ninth plea : This plea in substance alleged that the note was endorsed to the plaintiff after maturity, and set up certain equities existing between the original parties, the nature of which it is not necessary to give.

At the trial the defendants were allowed to add a thirteenth plea, which was as follows : That the said E. L. Perkins, (the payee), prior to the making of the said promissory note, was, and from thence hitherto

has been, and still is, an insolvent, and under the Insolvent Act of 1869, he being a trader, resident in the city of Ottawa, in the county of Carleton, duly made an assignment under said Act to Francis Clemow, of the city of Ottawa, official assignee for the said city of Ottawa and county of Carleton, and the said Francis Clemow hath since been, and still is, the assignee of the estate and effects of the said E. L. Perkins, under the said Act, and subsequent Acts relating to insolvency, and the said E. L. Perkins has not obtained his discharge ; by reason of which said premises, and by force of the statute in such case made and provided, all the right, title, and interest of the said E. L. Perkins, in, and to the said promissory note when made and delivered by the defendants to him, became, and was, and still is, vested in the said Francis Clemow, as assignee of the estate and effects of the said E. L. Perkins, and that the endorsement of the note by the said E. L. Perkins was made whilst he was an insolvent as aforesaid, and after the note became so vested in his assignee as aforesaid, nor did the plaintiff, until after that time, have any interest in or title to the said promissory note. And the defendants aver that at the time of the making and delivery by them of said note, they had no notice or knowledge of the insolvency of the said E. L. Perkins: that there was no notice or consideration for the making and delivery of the said note, except as in said seventh plea mentioned: that the said note was endorsed and delivered to the plaintiff by the said E. L. Perkins, without the knowledge or consent of the said assignee, and in fraud of the said defendants, and that the plaintiff took the said note knowing the said E. L. Perkins to be insolvent, and the estate to be vested in the said assignee.

The plaintiff demurred to this plea, and also took issue.

The learned Judge entered a verdict for the defendants on that issue, and for the plaintiff on the others.

In this term the demurrer was set down for argument.

In this term, November 20th, 1878, *Robinson, Q. C.*,

obtained a rule calling on defendants to shew cause why the verdict for them on the thirteenth plea should not be set aside, and a verdict entered thereon for the plaintiff; or for judgment for the plaintiff, notwithstanding the verdict on the said plea for the defendants, the said plea being bad in law and shewing no defence to the action, pursuant to the Common Law Procedure Act; or why the demurrer to the said plea should not be struck out of the record, on the ground that the said plea and demurrer thereto were improperly allowed to be added.

J. K. Kerr, Q. C., obtained a cross-rule calling on the plaintiff to shew cause why a verdict should not be entered for the defendants on the third, sixth, and ninth pleas, pursuant to the Common Law Procedure Act.

During the same term, December 5, 1878, the demurrer and rules were argued.

Robinson, Q. C., for the plaintiff. The evidence clearly supports the finding of the learned Judge on the third, sixth, and ninth pleas, and therefore it should not be interfered with. As to the thirteenth plea, the plea is bad in law, and judgment on the demurrer should be for the plaintiff. The authorities shew that an undischarged insolvent may maintain an action on a note, so long as the assignee does not intervene. The general principle applies, that you cannot set up the *jus tertii* unless you defend in privity with such third person. All the defendant has to do to protect himself when sued is to notify the assignee. The plaintiff is a *bonâ fide* holder for value, and defendants must be deemed to have guaranteed the insolvent's right to endorse: *Drayton v. Dale*, 2 B. & C. 293; *Story* on Promissory Notes, 7th ed., p. 121, sec. 102; *Bayley* on Bills, 6th ed., 54; *Chitty* on Bills, 11th ed., 23, 155-6; *Clarke* on Insolvency, 95; *Robson* on Bankruptcy, 3rd ed., 366; Insolvent Act, 1869, secs 10, 42; Insolvent Act, 1875, secs. 16, 39; *Dunn v. Irwin*, 25 C.P. 111; *Denison v. Smith*, 43 U. C. R. 503; *Bump* on Bankruptcy, 10th ed., 143, 542. Another ground is, that this was trust property, and did not pass to the assignee: sec.

10. On the evidence, also, the plea must be found for the plaintiff.

J. K. Kerr, Q. C., for the defendants. The thirteenth plea was properly found for the defendants. The cases on which the plaintiff relies proceeded on the ground that the endorsee, when he became the holder, was ignorant of the insolvency. Here the evidence shews that the plaintiff was fully aware of the insolvency, and the defendants, the makers, were ignorant of it. Under the circumstances there can be no recovery: *Bayley* on Bills, 6th ed., 54-5; *McKay* v. *Wood*, 7 M. & W. 430; *Kitchen* v. *Bartsch*, 7 East 53; *Braithwaite* v. *Gardiner*, 8 Q. B. 473; *Thompson* v. *Frere*, 10 East 418; *Ex parte Ford*, L. R. 1 Ch. D. 521; *Re Dowling*, L. R. 4 Ch. D. 689; *Ebbs* v. *Bulnois*, L. R. 10 Ch. 479; *Elliot* v. *Clayton*, 16 Q. B. 581, 584; *Smith* v. *Commercial Union Ins. Co.*, 33 U. C. R. 529, 535; *Green* v. *Steer*, 1 Q. B. 707; *Clarke* on Insolvency, p. 99. On the other pleas the learned Judge should have found for the defendants.

December 27, 1878. GALT, J.—The case of *Drayton* v. *Dale*, 2 B. & C. 293, is an express authority against the thirteenth plea.

Holroyd, J., in his judgment, says, at p. 301: "Here the defendant himself gives Clarke authority to endorse, and he asserts to all those who see the bill, that Clarke has that authority, and the assignees have not made any claim. I think, therefore, that the defendant is estopped from setting up their rights."

In *Bayley* on Bills, 6th ed., ch. 2, sec. 5, p. 54, it is said: "If a bill or note be made payable to an uncertificated bankrupt or order, the bankrupt's endorsee may sue the drawer of the bill or maker of the note; because, as against these parties, the form of the bill imports that the bankrupt is capable of endorsing."

See also the cases therein cited, which shew that such a plea would be bad if it were pleaded to an action by the uncertificated bankrupt himself, because it does not shew

that the assignee has intervened or made any claim to the note.

In *Chitty* on Bills of Exchange, the 11th ed., published during the present year, at page 23, it is laid down : "And so, the drawer or acceptor of a bill, or the maker of a note, will be estopped from pleading in bar to an action by an endorsee, the incapacity of the payee to endorse, on the ground that he was an infant, or an undischarged bankrupt."

Judgment will therefore be given for the plaintiff on the demurrer, and Mr. Robinson's rule to enter a verdict for plaintiff, notwithstanding that plea, be made absolute.

As respects Mr. Kerr's rule to enter a verdict for the defendants on the third, sixth, and ninth pleas.

The third plea is, that the plaintiff was not, at the commencement of this suit, the lawful holder of the note.

This has been already disposed of by the opinion we have expressed on the demurrer ; for as respects the plaintiff being the holder for value before the note matured, there can be no doubt on the evidence.

The sixth plea is, that the defendants were induced to make the said note through the fraud of the said E. L. Perkins, and the said promissory note was overdue when the same was first endorsed to the plaintiff.

This plea was disproved, both as respects the making of the note and as to the time when the endorsement was made.

The validity of the ninth plea also turned on the time when the note was endorsed by E. L. Perkins to the plaintiff, and as it was proved to have been made before the note matured, the verdict was properly entered for the plaintiff.

Mr. Kerr's rule will therefore be discharged.

GWYNNE, J.—I am unable to bring my mind to concur in the opinion that this case is to be governed by the doctrine of estoppel.

The judgments of both Bayley and Holroyd, JJ., in

Drayton v. Dale, 2 B. & C. 293, treat the doctrine of estoppel as resting, as appears to me, upon the *bona fides* of the endorsee from the bankrupt—that is, as I understand them, upon his taking the note, not only for value, but also in ignorance of the fact of the bankruptcy whereby the property in the note had passed to the assignee.

The reason of the thing appears to be this, that a person who has made a note payable to an uncertificated bankrupt, and thereby announced to the world that the payee is capable of transferring, shall not, at the suit of a purchaser for value, such purchaser being innocent, that is ignorant of the bankruptcy, be heard to say that the payee was not capable of transferring the note by endorsement.

Lord Abinger, C. B., in *Pitt v. Chappelow*, 8 M. & W. 616, seems to rest the application of the doctrine upon the like ground.

He says there, at p. 624: “I think the defendant is estopped from setting up such a defence. In *Barlow v. Bishop*, the plaintiff must be taken to have known the fact of the husband’s property in the bill, and he, therefore, could not take an assignment of it from the wife.”

In *Barlow v. Bishop*, 1 East 432, it was held that where a note had been made payable to a married woman, the plaintiff, who took the note by endorsement from her for value, could not recover against the maker, because he knew of the existence of the husband, in whom the title to the note vested.

Now, when Lord Abinger places his judgment, as to the estoppel, upon a distinction between the case before him and *Barlow v. Bishop*, it is clear that he must have been of opinion that, if the endorsee in *Pitt v. Chappelow* had known of the bankruptcy whereby the note had become the property of the assignee, the judgment in *Barlow v. Bishop* would have governed.

In the notes to the American edition of Meeson & Welsby, the learned editor, commenting upon *Pitt v. Chappelow*, says: “There can be no doubt as to the propriety of this decision, if it can be considered a matter of legal inference

from the pleadings, that the defendant knew of the bankruptcy of Baker at the time of accepting the bill payable to his order."

So in *Braithwaite v. Gardiner*, 8 Q. B. 473, Lord Denman, C. J., says, at p. 476: "Lord Abinger was a high authority on subjects of this kind; it is clear what his opinion was on the point of estoppel; * * and I think it rests upon sound principles. In this case, *all parties knowing the bankrupt's situation*, the defendant accepts a bill drawn by him. He thereby admits that the plaintiff had * * a right to maintain the action."

And Coleridge, J., says, at p. 477: "The acceptor is estopped as against *all whose situation he has altered with knowledge of the facts* by accepting. The acceptance here was given after all the proceedings in bankruptcy; *and the defendant having known of these*," (that is, the proceedings in bankruptcy), "now says to the endorsee: 'I will not pay you, who claim under the person to whom I held out the bankrupt as capable of drawing a bill.'"

And Wightman, J., says, at p. 478: "We must assume here that the indorsee who sues was a *bonâ fide* holder, and for value. Then the opinion expressed by Lord Abinger in *Pitt v. Chappelow*, 8 M. & W. 616, is a very strong authority for the plaintiff."

Fraud then, in the maker of the note or acceptor of the bill, seems to be the foundation of the doctrine of estoppel, and, therefore, as said in the above note to the American edition of M. & W., in *Pitt v. Chappelow*, cannot exist where both parties are aware of the real state of the case; and *a fortiori* the doctrine cannot apply where, as in the case before us, the maker was utterly ignorant of the insolvency, and the plaintiff, the indorsee, although for value, was fully aware of it and of the right of the assignee in insolvency.

For these reasons I am of opinion that, in so far as the doctrine of estoppel is concerned, this case is distinguishable from those wherein the defendant was held estopped from disputing the plaintiff's right to recover; but after the judgment of the Exchequer Chamber in *Herbert v.*

Sayer, 5 Q. B. 965, I regret to say, (because, as it seems to me, the merits of the case are on the side of the defendants), I am unable to distinguish this case in principle from that.

In that case, after a review of all the previous decisions and the correction of some errors apparent in some of them, it is established that an uncertificated bankrupt, notwithstanding the statutes relating to bankruptcy vested after-acquired property in the assignee by force of the antecedent assignment, as our Insolvent Act does, has an interest in all after-acquired personal property, and in all contracts made with him which he can dispose of, and enforce or transmit, if transmissible, as against all the world except the assignee; and that, therefore, he himself or his indorsee, in the case of a note or bill endorsed, can sue the maker or acceptor, unless the assignee intervenes; and that a defendant wishing to protect himself against an after suit brought by the assignee, has only to give notice to the assignee of the action brought against him.

I cannot see that our Insolvent Act vests the after-acquired personalty of an insolvent in the assignee, more firmly or to any greater extent, than the English Bankrupt Acts, upon which the above judgment proceeds, did.

I am therefore obliged to say, that I think this case must be governed by *Herbert v. Sayer*, and that upon the authority of that case the plaintiff is entitled to judgment (a).

The judgment will be for the plaintiff on the demurrer. The plaintiff's rule will be made absolute, and the defendants' rule discharged.

WILSON, C. J.—I am of opinion that the knowledge of the plaintiff of all the facts in the thirteenth plea, will not prevent the estoppel from applying.

Judgment and rules accordingly.

(a) See *Jameson v. Brick and Stone Co. (Limited)*, Weekly Notes, December 14, 1878, p. 233.

WAPELS v. BALL.

Assessment and taxes—Advertisement—Taxes in arrear for three years—
32 Vic. ch. 36, secs. 18, 128, 155.

Held, under sec. 155 of 32 Vic. ch. 36, O., that it is not essential to give evidence of lands sold for taxes having been duly advertised, where the two years have elapsed after the execution of the tax deed without its being questioned.

On the 18th July, 1873, a warrant issued, and on the 18th December following the land in question was sold for the taxes imposed in 1870.

Held, that under sec. 18 of 32 Vic. ch. 36, O., which makes the taxes due on and from the 1st January of the year in which they are imposed, the taxes for 1870 were due in that year for the first year, and consequently in 1872 for the third year, so that when the sale took place the taxes were due and in arrear for the third year, in accordance with sec. 128 of the Act.

THIS was an action of ejectment tried before Galt, J., without a jury, at Barrie, at the Fall Assizes of 1878.

The plaintiff claimed under a title derived from a sale for taxes made on 18th December, 1873.

The facts, so far as material, are stated in the judgment.

The learned Judge entered a verdict *pro formâ* for the plaintiff, in order that the question on which the case turned might be decided by the Court.

In this term, November 19, 1878, *Lount*, Q.C., obtained a rule calling on the plaintiff to shew cause why a verdict should not be entered for defendant, on the ground that there was no evidence that the land in question was duly and properly advertised by the county treasurer as required by law: that the lands in question were not three years in arrear for taxes as required by law before the sale of the same for taxes: that the said lands were advertised for sale as the east half of the east half, while the same were sold or offered for sale as the east forty acres of the east half: that the evidence shewed that the taxes for the year 1870, being the year for which the said lands were sold for taxes, had been paid by the defendant, and there was therefore no arrears of taxes due at the time of sale.

During the same term, December 3, 1878, *McCarthy*, Q. C., shewed cause. As to the first objection. There was no necessity for proving that the land was advertised, for this will be presumed when a warrant directing the land to be sold is produced, and under which the land is sold, and a deed executed. This is expressly decided in *Clark v. Buchanan*, 25 Grant 559. As to the second objection. There were clearly three years' taxes in arrear. By 32 Vic. ch. 36, sec. 128, being R. S. O. ch. 181, sec. 127, it is provided that wherever a portion of the taxes on any land has been due for or in the third year, or for more than three years preceding the current year, the land may be sold, &c. Under this section it is sufficient if there are three years' taxes due, inclusive of the current year, or the year in which the sale takes place. The third objection has been abandoned. As to the fourth objection. There is no evidence of the taxes having been paid.

Lount, Q. C., contra. The necessity for advertising the land is a duty imposed by the statute, and is imperative. It must therefore be strictly complied with. The absence, therefore, of proof of such advertisement is fatal to the plaintiff's title: *Cotter v. Sutherland*, 16 C. P. 357; *Hutchinson v. Collier*, 27 C. P. 249; *Morgan v. Quesnel*, 26 U. C. R. 539. The case of *Clark v. Buchanan*, 25 Grant 559, relied upon by the plaintiff, does not go the length contended. It in no way decides that the proof of the advertisement may be dispensed with, but merely that the production of the warrant is evidence of there being taxes in arrear. As to the second objection. There must be three clear years' taxes due and in arrear. Section 127 does not apply to a case of this kind. All it means is that when there are three clear years' taxes in arrear for which the land may be sold, the land may be also sold for the taxes due for the current year. There there were not three clear years' taxes due and in arrear. The taxes imposed in any year are not to be considered as in arrear until after the expiration of the year in which they are imposed, and therefore the taxes for 1870 were not in arrear until after the 1st of January, 1871.

When the warrant issued in 1873 the three years had not expired, and therefore at that sale there were not three clear years' taxes due and in arrear: *Bell v. McLean*, 18 C. P. 416; *Ford v. Proudfoot*, 9 Grant 478. As to the last objection, there is sufficient evidence to shew that the taxes for 1870 were paid.

December 27, 1878. GALT, J.—As to the first objection. By sec. 155 of 32 Vic. ch. 36, O., which was the law in force when this sale took place, it is enacted: "Whenever lands shall have been or may be hereafter sold for arrears of taxes, and the sheriff or treasurer, as the case may be, shall have given a deed for the same, such deed shall be to all intents and purposes valid and binding, except as against the Crown, if the same has not been questioned before some Court of competent jurisdiction by some person interested in the land so sold within two years after the passing of this Act, when the land was sold and a deed given by the sheriff or treasurer before the passing of this Act, or within two years of the time of sale, when such sale shall have taken place after the passing of this Act."

No question was raised at the trial as to the deed. It was produced, and had been executed for more than two years before this action was brought. It is true no evidence of any advertisement was given; but it appears to me such an objection cannot now be taken. The statute was passed for the express purpose of preventing objections of this description being taken.

The case of *Hutchinson v. Collier*, 27 C. P. 249, cited by Mr. Lount, turned on a very different fact. No evidence was there given of the existence of any warrant; and it was held that such omission was fatal.

In the case of *Clark v. Buchanan*, 25 Grant 559, Spragge, C., held that the warrant from the treasurer to the sheriff having been proved, and inasmuch as it would have been a breach of duty in the treasurer to have issued his warrant unless such taxes were in arrear, he thought that under the

maxim *omnia*, &c., it would be presumed that the necessary taxes were in arrear until the contrary was shewn.

This brings me to the consideration of the second ground taken in the rule, Mr. Lount contending that the evidence did not shew that there were three years of arrears when the land was sold.

The land was sold in December, 1873, for taxes due for 1870. The treasurer proved that the land was returned as non-resident land: that the taxes were unpaid in 1870: that the warrant was dated 21st July, 1873; and that the sale took place in December of that year. These facts were not disputed at the trial, nor on the argument before us, but Mr. Lount contended that, admitting the correctness of these dates, they shewed that the land had not been in arrear for three years, or, in other words, that the year 1870 should be excluded from the computation of time, as it could not be said that the taxes were due for 1870 until the 31st of December of that year, and therefore, as the sale was on the 18th of December, 1873, the three years had not expired.

By the 18th sec. of the Act: "The taxes or rates imposed or levied for any year shall be considered to have been imposed, and to be due on and from the first day of January of the then current year, and end with the thirty-first day of December thereof."

By the 128th sec.: "Whenever a portion of the tax on any land has been due for and in the third year, or for more than three years preceding the current year," &c., the land shall be liable to be sold.

The intention of the Legislature is not very plain as respects the latter part of the above provision, but it appears to me that the section must be read in connection with the 18th; and, if so, then the taxes on this land were due at any rate on 31st December, 1870, and in arrear on 1st January, 1871, 1872, 1873; and consequently over-due for and in the third year when the warrant issued in July, 1873, and therefore that they were liable to be sold.

The third objection, as to the description of the land, was not pressed before us, but was abandoned.

As to the last objection, the evidence was by no means clear that the amount of taxes for 1870 were ever paid, and even if they were, they were paid to a person who was not entitled to receive them.

WILSON, C. J.—The taxes of 1870 were not paid. The writ to sell the land issued on the 31st of July, 1873, and the sale was made on the 18th of September of that year.

The question is, whether that was a valid sale?

By the 32 Vic. ch. 36, sec. 18, O., under which the sale was made, and which clause is a transcript of section 18 of the 29 & 30 Vic. ch. 53, the taxes or rates imposed or levied for any year shall be considered to have been imposed, and to be due on and from the 1st of January of the then current year, and end with the 31st of December of that year, unless otherwise provided by the by-law.

That clause, by the Consol. Stat. U. C. ch. 55, sec. 16, read thus: "The taxes or rates levied or imposed for any year shall be considered to have been imposed for the then current year," &c. And the law in that respect continued so until the 29 & 30 Vic. ch. 53, when by section 18, it was made as it was afterwards re-enacted as above stated by the act of 1869; and that has continued to be the law since then: R. S. O. ch. 174, sec. 347.

Under the section as it stood before the year 1866, it was decided that there must be five years complete of some portion of the taxes being in arrear before the warrant could be lawfully issued to sell the lands in arrear: *Ford v. Proudfoot*, 9 Grant 478; *Kelly v. Macklem*, 14 Grant 29; *Bell v. McLean*, 18 C. P. 416.

There was nothing said in the earlier statutes under which these cases were decided that the tax "shall be considered to have been imposed and to be due on and from the first day of January of the then current year."

That was first provided by the Act of 1866.

Before that Act also land could not be sold for arrears of taxes unless some part of the taxes was "in arrear for five years." Non-resident land was rather different: 27 Vic. ch. 19, secs. 1-4.

By the Act of 1866, sec. 129, it was enacted that "Whenever a portion of the tax on any land has been due for and in the *fifth* year, or for more than *five* years preceding the current year," the treasurer shall make a list of lands liable to be sold.

And by sec. 131, it was enacted that "If any tax in respect to any lands sold by the treasurer after the passing of this Act, in pursuance of and under the authority thereof, shall have been due for the *fifth* year or more years preceding the sale thereof," and the same shall not be redeemed in one year after the sale, the sale and deed to the purchaser, if the sale has been openly and fairly conducted, shall be final and binding.

These sections were re-enacted by the 32 Vic. ch. 36 secs. 128 & 130, O., but reducing the period to *three* years, and they are contained in the R. S. O. ch. 180 secs. 127 & 155.

It is plain therefore that the taxes imposed for any year, say 1870, shall be considered "to have been imposed and to be due on and from the first day of January of the current year."

The tax for that year, say for 1870, is therefore a tax "which has been due for and in the first year."

If that be so, then 1871 must be the second year, and 1872 the third year. So that when the statute enacted that "whenever a portion of tax on any land has been due for and in the third year, or for more than three years preceding the current year," the treasurer shall submit a list of the lands liable to be sold for taxes, it would authorize the treasurer in 1873 to make a list of lands liable to be sold for taxes imposed in the year 1870, if remaining unpaid, because 1873 would be the current year, and the taxes for 1870 would in 1873 have been due for and in the third year preceding 1873.

The effect of these provisions is to make the time when the tax is due count from the first of January of the year when it was imposed, in place of from the time the collector got his roll in the fall of that year, or from the time he

made his demand for payment of the taxes, or from the end of that year, according to the decisions before referred to.

The like expression in sec. 131 "shall have been due for the third year," shews the Legislature quite understood the effect of the decisions of the Courts, and meant to avoid such effect, and to make the whole year in which the tax was imposed count as the first year, or as one of the years from the first of January of that year.

The warrant and sale were and are therefore valid in law.

GWYNNE, J.—I concur in thinking that the want of evidence of advertisement of the sale is cured by the 155th section of the Act; and that for the purpose of determining the time when the land might be sold for arrears of taxes we must, by force of the 18th section, treat the taxes of 1870 as having been due from the 1st day of January of that year, unless otherwise provided by by-law. The year 1872 was therefore the third year. The land could not, in my opinion, have been sold in the third year. The true construction of the 128th section appears to me to be to read the words "preceding the current year," as applicable to both of the antecedent branches of the sentence, namely, "*for and in the third year*," and "or for more than three years." To the word "in" as used in the first branch I am unable to give any intelligent meaning, but it seems to me to be very clear that the taxes of any year cannot be said to have been due for a third year until the expiration of that year. If due for the whole third year they have no doubt been due in that year, but the liability to sell does not arise until they have been due *for the* third year. So that the clause must be construed just the same as if it read, "whenever a portion of the tax on any land has been due for three years or more preceding the current year," &c.

Reading however the 18th section as I think we are bound to read it, the sale took place in the fourth year, and so was good.

Rule discharged.

BENEDICT V. KER.

Sale of goods—Admixture of property—Trover—Conversion.

The plaintiff, a farmer, left 552 bushels of barley with defendant, getting a receipt from defendant of his having received it from the plaintiff in store. The plaintiff intended to sell it to defendant, but as the market price was low, it was left with him. The defendant mixed it with other barley and sold it, dealing with it as his own, the plaintiff being at liberty, at any time, to accept the market price, or to call for the return, not of the identical barley, but of an equal quantity of the same quality, but no price was ever agreed upon, nor any barley returned. The defendant's premises were destroyed by fire, and he having refused either to pay for the barley, or to return a similar quantity, the plaintiff sued him in trover and on the common counts.

Held, that in any event the plaintiff must succeed, for that the defendant must be deemed either to have been guilty of a conversion in disposing of the plaintiff's barley as his own, or to have acquired the property in it.

THIS was an action of trover for the recovery of certain barley.

The common counts were added.

Pleas. To the count in trover: not guilty. To the common counts: never indebted.

The cause was tried before Patterson, J.A., without a jury, at Brantford, at the Fall Assizes of 1878.

The plaintiff produced a receipt from the defendant as follows:—"Received from W. Benedict in store five hundred and fifty-two bushels of barley, 26 Sep., 1876."

The plaintiff was a farmer, and the defendant a dealer in grain. The farmer delivered the barley in question, intending to sell it to the defendant, but as the price was low at the date of delivery, he left it with him in store. The defendant mixed it with other large quantities, and dealt with it as his own, the plaintiff being at liberty at any time to complete the sale by accepting the then market price, or he might call on defendant to return him an equal amount of barley of the same quality, but, from the very nature of their dealings, not the same identical grain.

After the barley had been received the plaintiff on several occasions called on defendant, but the price having fallen no sale was made, or rather no price was agreed on.

The store was burnt on the 19th December, 1876, and a large quantity of barley was consumed.

The defendant having refused to pay for the barley, or to return a similar quantity, this action was brought.

The learned Judge, being of opinion that the true position of the defendant was that of a gratuitous bailee, and that he was not responsible for the loss by fire, entered a verdict for the defendant, but reserved leave to the plaintiff to move to enter a verdict for \$303.60, if this Court should be of opinion that he was entitled to recover.

In this term, November 23, 1878, *McMichael*, Q. C., obtained a rule to set aside the verdict for the defendant, and to enter a verdict for the plaintiff.

During the same term, December 6, 1878, *Hardy*, Q. C., shewed cause. There was neither a sale of the barley nor a conversion by the defendant. The authorities shew that whether there is a sale or not depends upon the intention of the parties: *Benjamin* on Sales, 2nd ed., 228-9. Here there was a clear manifestation of an intention that there was to be no sale. The plaintiff himself swears that he never intended to sell. In *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101, an intent to sell was proved, and the price was fixed. Besides, the action was not between the original parties, but between the miller and a third person, and in *Isaac v. Andrews*, 28 C. P. 40, Hagarty C. J., points out this distinction. *Young v. Matthews*, L. R. 2 C. P. 129, shews that it is essential that the price should be fixed. The evidence also shews that the defendant had two kinds of receipts, one of which contained an endorsement by the defendant "at my risk." The other, as here, did not contain these words. On the former, the defendant admitted his liability. The fact of the defendant mixing the grain with his own and selling it did not constitute a conversion, as it was expressly proved that the plaintiff was aware that this was to be done.

McMichael, Q. C., and *Smythe* (of Brantford), contra. The evidence clearly shews that there was a sale. The

grain is delivered to defendant and mixed with his own, and sold by defendant, so that if the plaintiff did not desire to accept the market price, he could not get back his identical grain, but only an equivalent amount. The fact itself that the plaintiff could not demand back his identical grain, shews that there was a sale. The case of *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101, concludes the defendant. *Isaac v. Andrews*, 28 C. P. 40, is very distinguishable. There the grain was kept separate, and the plaintiff could get back his identical grain whenever he chose to call for it. Besides, the risk of fire was specially excepted. See also, *Story on Bailments*, 9th ed., secs. 47, 198, 237-40, 374.

December 17, 1878. GALT, J.—Upon the facts disclosed in the evidence, this rule must be made absolute.

The law concerning transactions of this kind is laid down in *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. p. 101. The circumstances, as detailed therein, so far as the delivery of the grain was concerned, were precisely the same as those now before us.

Sir Joseph Napier says, at p. 107 : “The substance and effect of all the evidence that bears on this part of the case is this: when wheat was brought by the farmer to the miller” (in this case the merchant), “he delivered it to the miller” (merchant), “to be stored with his current stock, that was used for the known purposes of his trade. It was, with the consent of the farmer, put into storage with this consumable stock of the miller; the farmer got a storage receipt for it, and might afterwards come at any time he thought fit to claim the price of the same quantity of wheat of equal quality according to the market price of the day on which he claimed payment. * * There is no direct evidence that the farmer had the option of claiming an equal quantity of wheat of the like quality, instead of the value in money. * * Taking the view * * that the farmer could claim as of right an equal quantity of the like quality, this must be without reference to any specific bulk

from which it should be taken, for the stock with which he consented to allow his wheat to be mixed might all have been used for the benefit of the miller before the claim of the farmer would be put forward."

He then says, at p. 112: "Here, by force of the contract, the miller might use as his own the whole of the wheat that was delivered to him by the farmers. Accordingly, the miller would be responsible to the farmers, notwithstanding the loss of the wheat by the fire."

This is decisive of the present case.

In the case of *Isaac v. Andrews*, 28 C. P. 40, which was before this Court in last Easter Term, the circumstances were the reverse of the present. The wheat had been kept separate, and in the storage receipt accident by fire was excepted,

The rule must be absolute to enter a verdict for \$303.60, and the plaintiff is entitled to full costs, pursuant to the certificate of the learned Judge.

GWYNNE, J.—This case is quite different from that of *Isaac v. Andrews*, 28 C. P. 40, and is governed by the case in the Privy Council, *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101. The evidence clearly establishes that the defendant did not keep the plaintiff's barley apart from his own, but, on the contrary, that he mixed it with his own, and dealt with it, shipped it, and sold it as his own. Having so dealt with the barley, which he now alleges he only held in store as a bailee for reward, he is placed in this dilemma, that he must either have acquired the property in it, or else that he was guilty of a conversion in disposing of the plaintiff's property as his own; so that *quacunque viâ* the plaintiff is entitled to recover, either on the common count or the count for conversion.

WILSON, C. J., concurred.

Rule absolute.

BROGAN V. THE MANUFACTURERS AND MERCHANTS'
MUTUAL FIRE INSURANCE COMPANY.

*Insurance—Title—Incumbrances—Condition in application, but not in
policy—Evidence.*

In an action on a policy of insurance against fire on a frame building, the defendants pleaded that by a condition of the policy the application was made a part and condition of the insurance contract, and that by said application the plaintiff covenanted that the same was a just, full, and true exposition of all the facts and circumstances, so far as known to the applicant and material to the risk, and that the plaintiff falsely and fraudulently represented that he was the owner of the land on which the insured property was situate, and that no other person had an interest therein, whereas he was not such owner, which were facts material to be known to the defendants and to the risk, whereby the insurance was not in force. The defence was based on the answers to the questions: 1. "State the nature of your title, whether fee simple," &c. "If others are interested, give name, interest, and value." Answer. "Owner." 2. "What incumbrance, if any, is now on said property"? Answer. "\$60 balance of payment, to be paid in four years." It appeared that the applicant purchased the land from a minor for \$60, to be paid for, and the deed to be given in four years, when the minor became of age; and that the house was so built as to be capable of removal; and it was admitted that all these facts were known to the defendants' agent when he took the application. There was no condition on the policy making the application a part and condition of the insurance contract, but it was urged that because by the terms of the application it was expressly so made the condition therein contained, as alleged in the plea, could be so set up.

Held, that the plea was not so pleaded as to enable the defendants to take advantage of the condition relied upon.

Held, also, that the plea was in fact disproved, for that the plaintiff's title and interest, as also the incumbrances, were communicated according to the truth, in that the plaintiff was the owner of the house, and in a sense also of the land under the agreement for the purchase thereof, and that there was an incumbrance of \$60.

DECLARATION, on a policy of insurance for \$600 against fire, to wit, \$250, on a two-story frame building, occupied as a waggon-maker's shop and residence; \$50 on household furniture, &c.; \$50 on tools and patterns; \$100 on new material; \$150 on vehicles completed and in process of manufacture.

The only plea which it is necessary to give is the fourth. This was as follows: that the said policy had printed thereon and was made subject to the statutory declarations mentioned in the Insurance Policy Act of the Province of Ontario,

ch. 162 of the Revised Statutes of the said Province, and subject to the variations of said conditions endorsed on the said policy of insurance, and an additional condition, amongst others, that the application of the said plaintiff on which the said policy was granted should form part and be a condition of the contract for said insurance. And the defendants say that the said plaintiff in and by the said application covenanted and agreed to and with said defendants, that the same was a just, full, and true exposition of all the facts and circumstances, condition, situation, and value of the property, so far as the same were known to the plaintiff and material to the risk. And the defendants say that at the time of the said application the said plaintiff was not the owner of the land on which the property insured was situated, and that other persons were interested in the same, and that the title to the said lands was a fact material to the said risk, and material to be made known to the defendants in order to enable them to judge of the said risk under the said policy. And the defendants say that the plaintiff, in and by the said application, falsely and fraudulently represented and stated that he was the owner of the said land, and that no other person had any interest in the same, and the defendants had not at the time of the making of the said policy, nor at any time prior to the said loss, any notice or knowledge of the facts above stated as to the ownership of the said land—whereby, and by force and effect of the conditions in that behalf, the said insurance in the declaration mentioned was not, nor is, in force.

The cause was tried before Armour, J., without a jury, at Guelph, at the Fall Assizes of 1878.

At the trial the following admissions were put in :—

1. The defendants admit the policy of insurance on which the action is brought,

2. The defendants admit that the plaintiff is entitled to recover the full amount of his claim, unless the Court decide that there was such a misrepresentation as to ownership as that he is not entitled to recover any portion thereof; or, if entitled to recover any portion, the Court to state what portion the plaintiff is to recover.

3. The plaintiff admits the application on which the policy was issued at the same date, 3rd of March, 1877.

4. The plaintiff admits the claim papers filed with the defendants shewing the amount of his loss, and declared before Mr. Cutten the 20th day of September, 1877.

5. It is admitted that the agent of the defendants who took the application knew the actual title of the plaintiff as disclosed in the said claim papers at the time of the taking the application.

The application, after describing the property insured as set out in the declaration, contained the following provisions, namely: "The applicant will answer the following questions, and sign the same as a description on which the insurance is to be predicated." There were some twenty questions in all, amongst which were:—

"1. *Title*.—State the nature of your title, whether fee simple, leasehold, or by bond or agreement. If others are interested, give name, interest, and value. Ans. Owner.

"2. *Incumbrance*.—What incumbrance, if any, is now on said property? Ans. Sixty dollars, balance of payment, to be paid in four years."

At the foot of the questions was the following: "The applicant is requested to answer the above questions fully, as it is expressly agreed on the part of the applicant that this application and survey, as well as the diagram of the premises herewith, shall form part and be a condition of this insurance contract. * * And the said applicant hereby warrants, covenants, and agrees, to and with said company, that the foregoing is a full, just, and true exposition of all the facts and circumstances, condition, situation, and value of the property to be insured, so far as the same are known to the applicant and material to the risk."

There was no condition on the policy making the application part of the policy.

In the claim papers there was the following statement: "My title to the property destroyed as aforesaid was that of owner thereof, and at the time of the fire I was interested therein to the value thereof as shewn by said schedule.

The land upon which said building stood was purchased or agreed to be purchased by me from Robert John Williams, for sixty dollars, to be paid by me in three years from the present time when the said Williams should come of age, at which time I was to get a deed of the same. The said building was built by me pursuant to said agreement. The said building was placed on cedar posts."

The learned Judge entered a verdict for the plaintiff, leave being reserved to the defendants to move.

In this term, November 21, 1878, *J. H. Ferguson*, obtained a rule calling on the plaintiff to shew cause why a verdict should not be entered for the defendants, upon reading the admissions and papers filed.

During the same term, December 2, 1878, *Guthrie*, Q. C., shewed cause. The question turns on the fourth plea. The word "owner" is a sufficient answer to the question as to title, &c. He was the owner of the land in equity under the agreement for the purchase of the land, and he was to have a deed when the infant became of age. The contract of the infant is voidable merely, and not void, and was good until avoided. At all events the answer was true as to the house. He was the owner of the house, and it was built so as to be capable of removal: *Hopkins v. Provincial Ins. Co.*, 18 C. P. 74; *White v. Agricultural Mutual Ins. Co.*, 22 C. P. 98. The question as to the encumbrances was also sufficiently answered. The answer, \$60, balance of payment to be paid in four years, &c., could only mean balance of payment of purchase money. Moreover, there is no such condition as is set up in the plea.

J. H. Ferguson, contra. The answer of "owner" to the question as to title, &c., is not sufficient. It does not disclose the title. The applicant was in no way owner. The agreement for purchase from the infant does not give any title to the property, for the plaintiff could not have enforced the agreement. The answer as to the encumbrances is also insufficient. It in no way states that the land was encumbered. The company only look to the

application to guide them, and they had no notice of any encumbrance. Even if the agent had notice this could not affect the company: *Shannon v. Gore District Mutual Ins. Co.*, 37 U. C. R. 380; *Shaw v. St. Lawrence County Mutual Ins. Co.*, 11 U. C. R. 73. The plea sufficiently sets up the condition relied on. The application by its very terms, is made a condition of the policy; and by it the applicant warranted the truth of the answers therein contained.

December 27, 1878. GALT, J.—On the argument it was stated by the learned counsel that the question turns on the fourth plea.

Mr. Guthrie contended that this plea was not proved. I am of opinion that this objection is entitled to prevail. There is no such condition endorsed on the policy, but the defendants' counsel contended that inasmuch as in the application there is a clause whereby "the applicant hereby warrants, covenants, and agrees to and with the said company that the foregoing is a full, just, and true exposition of all the facts and circumstances, condition, situation, and value of the property to be insured, so far as the same are known to the applicant and material to the risk," the same is to be imported into and read as a condition in the policy.

There is no such condition in the policy. It is not stated therein, as is sometimes done, that the application is to be taken as part of the policy. It is true that in the application there is this direction, "The applicant will answer the following questions, and sign the same as a description on which the insurance is to be predicated." And at the foot thereof, "The applicant is requested to answer the above questions fully, as it is expressly agreed on the part of the applicant that this application and survey, as well as the diagram of the premises herewith, shall form part and be a condition of this insurance contract." If then the defendants wished to avail themselves of this as a condition, as one on which the policy was issued, they ought to have so pleaded it, which they have not done, but have pleaded that the policy contains such

a condition, which is not the case, no reference to the application being contained in the policy.

But apart from this, I am of opinion that the plea has been disproved in every respect. The application is for insurance on building of a frame waggon-maker's shop and residence, and on certain articles contained therein. The question and answer relied on by the defendants as constituting a breach of what they call a condition, are:—

1. *Title*.—State the nature of your title, whether fee simple, leasehold, or by bond or agreement. If others are interested, give name, interest, and value. *Answer*.—Owner.

2. *Incumbrance*.—What incumbrance, if any, is now on said property? *Answer*.—Sixty dollars, balance of payment, to be paid in four years.

This sum of \$60 is actually stated on the face of the policy as "Incumbrance." In the admissions made at the trial, the defendants admit the truth of the statements made in the claim papers. We find there the following statement: "My title to the property destroyed as afore-said was that of owner thereof, and at the time of the the fire I was interested therein to the value thereof, as shewn by said schedule. The land upon which said building stood was purchased or agreed to be purchased by me from Robert John Williams, for sixty dollars, to be paid by me in three years from the present time, when the said Williams should come of age, at which time I was to get a deed for the same. The said building was built by me pursuant to said agreement. The said building was placed upon cedar posts."

It is part of the admissions that the agent of the defendants, at the time he took the application, knew the state of the plaintiff's title. There is no question but that the plaintiff was the owner of the house, and that if on the minor coming of age he had refused to carry out the sale of the land the plaintiff might have removed it. It was his property, and he was the owner.

That point has been expressly decided in this Court in

Hopkins v. Provincial Ins. Co., 18 C. P. 74, where all the cases bearing on the subject are referred to by the present Chief Justice of this Court.

This rule will therefore be discharged.

GWYNNE, J.—The case of *Scanlan v. Sceals*, 5 Ir. L. R. 154, shews that insurers may introduce into the policy of insurance such part of the agreement contained in the application as they desire to make part of the policy. So in like manner they may, if they please, omit every thing contained in the application. That is what they have done here. Yet they declare upon matter contained only in the application as if it had been, although it is not, incorporated into the policy by any reference to the application; and, moreover, they set out the agreement in the declaration different from what it is in the application, the whole being there qualified by the addition of the words, “and material to the risk,” after the words, “so far as the same are known to the applicants.”

But further matter of complaint is, that the plaintiff falsely and fraudulently represented that he was the owner of the land upon which the property insured was situate, and that no other person was interested therein. He did not in terms speak in the application of the land upon which the house and shop insured was situate, but of the house and shop itself. No doubt it might be inferred, when he said he was the owner of the property proposed to be insured, part of which was the house, that he meant to convey he was owner of the land.

In truth, as appears, and as it was admitted, his title was known to the agent of the company—that he was owner of the house, which was so built as to be capable of removal, and he was also owner of the land also, in the sense that he had made a contract to purchase it from an infant, and a balance of the purchase money, viz., \$60, was agreed to be paid only when the infant should come of age and execute a conveyance.

Now in the application it does, I think, sufficiently

appear, that the plaintiff's title was substantially communicated to the defendants in good faith according to the truth: viz., that he was owner of the building, and that no one had any interest therein, but that there was an incumbrance of the sixty dollars, balance of payment, to be made in four years. The plaintiff's title being admitted to have been known to the agent of the defendants, and to be substantially as stated in the application, the defendants could not expect to succeed in establishing this to be a fraudulent representation, even if their policy and plea were framed so as to enable them to raise the point.

WILSON, C. J., concurred.

Rule discharged.

MURPHY V. YEOMANS.

Partnership—Sale after dissolution—Validity of.

G. D. and A. D., who were in partnership as bakers, purchased some wheat for their business, but, not being of the required quality, it was not used by them. On January 28th, 1876, the partnership was dissolved by an instrument under seal, G. D. giving A. D. \$165 in cash and a note for \$500, retaining the assets and continuing the business. On March 14th, A. D., on the ground of his being a minor and not bound by the terms of the dissolution, filed a bill in Chancery by his next friend for a partnership account. On March 16th, being after the dissolution, G. D., to meet existing demands against the partnership, and to convert the assets into money for the benefit of the partners, *bona fide* sold the wheat for value to the plaintiff, who was aware of the dissolution, but not of the Chancery proceedings.

Held, that the sale was valid.

The defendant who held the wheat in store for the firm, on receiving a delivery order signed by G. D., undertook to hold the wheat for the plaintiff, and negotiated with him for the purchase of it, but afterwards repudiated the plaintiff's title on being indemnified for A. D., and refused to give the wheat up to the plaintiff.

Semble, that the defendant, after what he had done, could not be permitted to set up A. D.'s title against the plaintiff.

THIS was an action of replevin, brought under the statute enabling replevin to be brought in all cases where trover or trespass might be brought; and it was in effect an action

for the conversion by the defendant of a large quantity, to wit, 916 bushels of spring wheat, alleged to be the property of the plaintiff.

The defendant pleaded : 1. Not guilty.

2. That the said wheat was not, at the time of the commencement of this action, the property of the plaintiff.

3. That the wheat, at the commencement of the action, was the partnership property of George Dickson and Alexander Dickson, and held in store by the defendant for them which is the detention complained of in the declaration.

The cause was tried before Armour, J., without a jury, at Guelph, at the Fall Assizes of 1878.

It appeared that the wheat in question had been purchased, but not all paid for, by Alexander Dickson and George Dickson, who had been in partnership as Bakers, which partnership was dissolved by an instrument executed under their hands and seals upon the 28th January, 1878. After the dissolution, George Dickson, the elder brother, continued the business and retained the assets, having, upon the dissolution, given to his younger brother \$165 in cash and his note for \$500 ; but Alexander Dickson being under age, he, by his father as next friend, filed a bill in Chancery upon the 14th of March, in which the plaintiff, insisting upon the said dissolution, claimed the right upon the basis of it to have an account taken of the partnership business under the direction of the Court, insisting that as an infant he was not bound by the amount paid by George Dickson upon the dissolution.

It appeared further, that upon the 16th of March, George Dickson sold the wheat to the plaintiff for value.

It did not appear that at the time of the purchase the plaintiff had any notice of the bill having been filed.

It appeared further, that after the plaintiff shewed to the defendant a delivery order for the wheat signed by George Dickson, he, the defendant, undertook to hold the wheat for the plaintiff, and negotiated with him for the purchase of it, but afterwards repudiated the plaintiff's title, and, being indemnified by the father of Alexander Dickson,

refused, upon demand made by the plaintiff, to deliver up the wheat to him.

It was attempted at the trial to set up as a defence that the plaintiff did not in reality buy the wheat, but that the transaction between him and George Dickson was merely colourable, and entered into merely for the purpose of assisting George to deprive his brother Alexander of the fruits of his bill filed in Chancery ; but the evidence not only failed to establish any such case, but clearly established that the plaintiff was a *bonâ fide* purchaser for value.

At the close of the case it was conceded that there was a sufficient demand and refusal of the wheat.

It was also conceded that at the date of the dissolution of the partnership, Alexander Dixon was one month under the age of twenty-one years : that it was known to the plaintiff before the sale to him that the wheat in question had been partnership property, and that there was a difficulty between the brothers as to the dissolution ; and that the defendant was indemnified by one Peter Dickson upon behalf of Alexander Dickson.

Thereupon the learned Judge entered a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit or a verdict for one undivided half of the property in question, or such other verdict as the Court might think proper, the Court to be at liberty to read in the action, with the evidence taken at the trial, the bill, answer and decree in the Chancery suit between Alexander Dickson and George Dickson.

In this term, November 20, 1878, *Guthrie*, Q.C., obtained a rule calling upon the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a nonsuit entered, or a verdict for the defendant, upon the ground that the plaintiff had no better right to the wheat in question than George Dickson from whom he purchased : that he had not the right to the possession of the wheat as against Alexander Dickson, or the defendant acting under or for him ; and that under the circumstances given in evidence

the defendant was justified in retaining the wheat as against the plaintiff, who claimed a full title to the whole, and possession of the whole to the exclusion of Alexander Dickson's claim.

During the same term, December 2, 1878, *Drew*, Q. C., shewed cause. The defence is, that Alexander Dickson was not bound by the dissolution, because he was a minor. There is nothing in this. Then as to the right to sell. It is clearly laid down that each partner has the right to sell the partnership property, and where the sale is *bona fide*, the mere omission to obtain the consent of the co-partners will not invalidate the sale: *Fox v. Rose*, 10 U. C. R. 16; and the same right continues after the partnership has been dissolved. Here, however, George Dickson, by the terms of the dissolution, retained the partnership property and carried on the business, and therefore he had the right to sell. Moreover, the bill in Chancery does not ask to have the sale set aside. The attempt to disprove the *bona fides* of the sale clearly failed.

Guthrie, Q. C., contra. The defendant's whole case was rested at the trial on the ground of the sale not being *bona fide*, but being made in collusion with the plaintiff to defraud Alexander Dickson. The defendant was prepared to prove this, but the learned Judge refused to receive the evidence, as he held that George Dickson had the right to sell, and the plaintiff was entitled to stand on his rights. The question of *bona fides* was, therefore, never tried. The plaintiff had clearly no right to sell. There was no valid contract of dissolution, for Alexander Dickson as a minor was not bound by the dissolution: at all events, after the dissolution, the property became the joint property of the partners, and one joint owner has no implied authority to sell the joint property: *Lindley* on Partnership, 3rd ed., 909-10; *Mayhew v. Herrick*, 7 C. B. 227, 247; *Foster v. Crabb*, 12 C. P. 136; *Fennings v. Grenville*, 1 Taunt. 241. Even if there was a right to sell for partnership debts, there was only a small sum due, and as the property was separable, there was no necessity to sell the whole.

The plaintiff, as the purchaser of a chattel, takes it with all its infirmities. The bill in Chancery is important as shewing a repudiation of the dissolution.

January 27, 1878. GWYNNE, J.—The evidence, as it seems to me, fails to affect the plaintiff with any fraud in the purchase, or with notice of the nature of the claim of Alexander Dickson, which was to have an account taken of the partnership, and the assertion of a claim to have a greater allowance made to him out of the partnership assets than that which had been made to him at the time of the dissolution, and praying that a receiver might be appointed to take possession of the assets.

This we see now by the bill filed, but the evidence fails to affect the plaintiff with notice of the contents of the bill, or of any bill having been filed, if such notice would have defeated his purchase. I think upon this evidence it must be taken that the plaintiff purchased for value, and paid his money in the full conviction that he was acquiring a good title; and when he communicated his purchase to the defendant, and the defendant dealt with him as the owner, and undertook, as I think the evidence shews he did undertake, to hold the wheat for him, and treating him as owner, negotiated with him for the purchase of it, the defendant cannot now, I think, be permitted to set up against the plaintiff title in Alexander Dickson.

But I do not desire to rest my judgment in this case upon such narrow ground, for, in my opinion, the evidence shews that the property in the wheat in question passed to the plaintiff by the sale made to him by George Dickson.

Mr. Guthrie's contention was, that the sale having been after the dissolution of the partnership, passed no title to the property, nor any thing more than George Dickson's interest therein, which has yet to be determined by the taking of the partnership accounts in Chancery.

In *Butchart v. Dresser*, 4 DeG. M. & G. 542, Lord Justice Turner, pronouncing judgment, says, at p. 544: "The general law is clear, that a partnership, though dissolved, con-

tinues for the purpose of winding up its affairs. Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership, for partnership purposes, as he had during the continuance of the partnership." And he adds: "Nor is there any inconvenience in this state of the law; for it is competent for the partner to apply, in case of necessity, for a receiver, and to have the affairs of the partnership wound up under the direction of the Court."

Observing upon this case, Mr. *Lindley*, in the 3rd edition of his work upon Partnership, at p. 427, contends that the doctrine cannot be carried further than this, that "Notwithstanding dissolution, a partner has implied authority to bind the firm, so far as may be necessary to settle and liquidate existing demands, and to complete transactions begun, but unfinished, at the time of the dissolution."

This certainly seems to confine the language of Lord Justice Turner within narrower limits than the language used conveys.

In *Collyer on Partnership*, 4th Am. ed., sec. 546, it is said: "For the purpose of making good outstanding engagements, of taking and settling all the accounts, and converting all the property, means, and assets of the partnership, existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and proportions, the legal interest subsists, although for all other purposes the partnership is actually determined."

If Alexander Dixon wished to restrain George Dickson in the exercise of this legal right, he should have applied, as it appears to me, for an interim injunction, if he could not obtain an order for a receiver in time; but where a sale takes place after a dissolution, and the purchaser pays his money in the *bonâ fide* belief that the vendor was exercising his legal right for the benefit of all who were partners, it would be a hard measure of justice, as it seems to me, to deprive the purchaser of the benefit of his purchase,

because the partners differed among themselves as to the amount of their respective interests in the partnership assets.

However, I think that in this case there can be no doubt the property passed to the plaintiff That he was a *bonâ fide* purchaser for value, without any notice that Alexander Dickson disputed George's right to sell, I think is the proper conclusion to be drawn from the evidence. He found George carrying on the business which had formerly been carried on in partnership with his brother, and to all appearance the owner of the assets which had been partnership assets. Then the sale took place, as I think the evidence also establishes, partly to pay a debt due by the partnership to the person who had purchased the wheat in question for the partnership, and in respect of the wheat so purchased, and partly because the flour produced from the wheat was not as good as George Dickson's business, as a baker, required. The wheat having been purchased for the purpose of being ground into flour to be used in the business of a baker, the conversion of it into money when it proved unfit for the business was a reasonable thing to be done in the interest of the partners, and probably the best thing to be done under the circumstances.

I am of opinion, therefore, that we cannot hold that this sale took place otherwise than in the legitimate exercise by a continuing trader after a dissolution of a partnership, of his right to dispose of the partnership assets to meet existing demands against the partnership, and for the purpose of converting those assets into money in the interest of the partners.

And I am of opinion that the property passed to the plaintiff by the sale to him, and that the rule which seeks to set aside the verdict in his favour should be discharged.

The rule will be discharged, with costs.

WILSON, C. J., and GALT, J., concurred.

Rule discharged.

REGINA V. HEROD.

Murder—Evidence—Relevancy of.

On a trial for murder, the death of the deceased was shewn to have been caused by his being stabbed by a sharp instrument. It was proved that the prisoner struck the deceased, but neither a knife nor other instrument was seen in his hand. For the prisoner evidence was offered that on the day preceding the homicide, the prisoner had a knife which could not have inflicted the wound of which deceased died; and that on that day, the prisoner parted with it to a person who held it until after the crime was committed. The learned Judge at the trial refused to admit this evidence.

Held, GALT, J., dissenting, that the evidence was properly rejected.

This was a case reserved by Burton, J. A., at the sitting of Oyer and Terminer held at Cayuga, on 5th November, 1878.

The prisoner was indicted for the murder of one Joseph Calvert, and was convicted of manslaughter.

The testimony of the medical men who were examined on the trial, and who made the *post mortem* examination on the body of the said Joseph Calvert, shewed that death had been caused by a sharp instrument, the blade whereof must have been at least five inches in length, and from half to three-quarters of an inch in breadth.

On the trial the prisoner's counsel proposed to shew that the prisoner, on the day preceding the homicide, had a knife which, according to the medical testimony, was not calculated to inflict the wound which caused the death of the deceased: that on that day he parted with it to a person who kept it until after the deed was done: also that the prisoner, on the day of, but previously to, the stabbing, borrowed a knife at the hotel where he was from a young woman to cut tobacco, and returned it immediately to her before any reason existed for supposing the deceased and the prisoner would have any quarrel: that the stabbing took place in the street on a very dark night, with a number of persons about, some hostile to the prisoner and some friendly to him.

Two witnesses swore they saw the prisoner strike

deceased. One stating that he witnessed one, the other two blows, but no knife or other instrument was seen in his hand.

The learned Judge rejected the evidence tendered in respect to the prisoner's parting with the knife on the day before the stabbing, but with doubt as to its relevancy. He admitted evidence of his borrowing and returning a knife on the day of the stabbing.

The learned Judge rejected the other evidence on the ground of its being too remote, and because it would not shew that it was impossible for the prisoner to have had a weapon that might have caused the wounds of which deceased died.

The evidence of the above facts was objected to by the counsel for the Crown.

The prisoner was convicted of manslaughter, and sentenced to ten years in the Provincial Penitentiary.

At the request of the prisoner's counsel a case was reserved for the opinion of this Court.

The question reserved for the decision of the Court is, was the evidence tendered by the prisoner, and rejected by the learned Judge, admissible, or was the learned Judge justified in rejecting it.

In this term, November 30, 1878, the case was argued.

McMichael, Q. C., for the prisoner. The evidence should have been received. The prisoner had clearly the right to shew that the day before the homicide was committed he had parted with the only knife he had in his possession, and had not received it back again. This was one of the surrounding circumstances, and should have been submitted to the jury.

J. Crerar, for the Crown. The prisoner's counsel at the trial having admitted that the knife which it was proposed to give evidence of was not capable of having inflicted the wound, there could be no object in submitting such evidence to the jury. It was clearly too remote, and was therefore properly rejected. The law is laid down in *Taylor* on

Evidence, 7th ed., vol. i., sec. 316, that the rule of confining the evidence to the points in issue excludes all evidence of collateral facts, which are incapable of affording any reasonable presumption as to the principal matters in dispute. It is there pointed out that the Judge should reject as too remote every fact which merely furnishes a fanciful analogy or conjectural inference.

December 27, 1878. WILSON, C. J.—I do not think the learned Judge was wrong in rejecting the evidence, that the day before the commission of the offence the prisoner had in his possession a knife, which the prisoner's counsel stated could not have inflicted the wound which caused the death of the deceased, and that he parted with it that day, and did not receive it back.

The question was whether he had in his hand at the time the wound was given a knife or sharp instrument which had a blade at least five inches in length and from half an inch to three-quarters of an inch wide; and whether he had a knife the day before which was nothing like the one with which the wound was inflicted was wholly irrelevant.

The judgment pronounced at the trial will therefore be affirmed.

GWYNNE, J.—When it was admitted by the learned counsel for the prisoner at the trial that the knife about which he desired to give evidence could not have inflicted the wound of which the deceased died, the learned Judge was, in my opinion, right in refusing to receive the evidence. Evidence as to what may have become of a knife which could not have inflicted the fatal wound could not throw any light whatever upon the question of the identity of the person who did inflict a wound of which it appears the recipient instantly died; and it was only in this view that it was suggested the evidence was offered.

GALT, J.—On the trial of the prisoner, who was indicted for murder, it appears from the report of the learned Judge who tried the case, that the death of the deceased had been caused by a sharp instrument, the blade whereof must have been at least five inches in length and from half to three quarters of an inch in width.

It was also proved that the stabbing took place in the street on a very dark night, with a number of persons about, some hostile to the prisoner and some friendly to him. Two witnesses swore they saw the prisoner strike deceased, one stating that he witnessed one, the other two blows, but no knife or other instrument was seen in his hand. The prisoner's counsel proposed to shew that the prisoner on the day preceding the homicide had a knife, which, according to the medical testimony, was not calculated to inflict the wound which caused the death of the deceased. I understand from this, and also from the statement by the counsel for the Crown on the argument, that what is meant is, that the prisoner had a knife which was not calculated to inflict a wound such as that described by the medical witnesses: that on that day he parted with it to a person who kept it until after the deed was done. The evidence to establish this was rejected by the learned Judge on the ground of its being too remote, and because it would not shew that it was impossible for the prisoner to have had a weapon that might have caused the wounds of which deceased died.

This rejection took place on the objection of the counsel for the Crown, and the learned Judge has reserved the question for the consideration of this Court, as to whether such evidence was admissible and ought to have been received.

In my opinion the evidence was admissible, and should have been received. The charge was, that the prisoner had committed murder by stabbing. No knife was found in his possession, and the defence was, that he had no weapon with which the wound could have been inflicted, in support of which it was proposed to shew that the only knife

which he did possess was one which was not calculated to inflict the injury, and not only so, but that such as it was he had parted with it before the unfortunate occurrence took place.

We are not called upon to say what effect such evidence might have had on the jury, but whether it should have been submitted to them.

I think such evidence was entitled to very little weight, but that is not the question now before us.

It surely was very important for the prisoner to shew, if he could, that he did not possess the means of committing the crime.

In other words, he was endeavouring to prove a negative, and any circumstances tending to strengthen that position should have been submitted to the jury.

As I understand the case, the evidence tendered was objected to by the counsel for the Crown, on the ground "that it was too remote, and would not shew that it was impossible for prisoner to have had a weapon that might have caused the wound."

To reject the evidence on this ground would really deprive a prisoner of all means of defence.

Suppose the defence had been of a different description, say for instance an *alibi*, and that the charge was, that a murder had been committed at twelve o'clock, and that circumstances pointed strongly to the accused as the party who had done it. Could evidence that the accused was at a different part of the town at the time of eleven o'clock be rejected, because it would not shew that it was impossible for the prisoner to have been present at the place where the crime was committed at the hour when it did take place?

The question is not whether the evidence was entitled to much weight, but whether it was admissible, and as I am of opinion that it was, I think it should have been received.

Conviction affirmed.

IN THE
COURT OF COMMON PLEAS.

Regulae Generales.

*As of Michaelmas Term, 42 Victoria, Friday, the 27th
day of December, A. D. 1878.*

GENERAL RULES
FOR THE
TRIAL OF CONTROVERTED ELECTIONS
OF MEMBERS OF THE
HOUSE OF COMMONS.

Made under and by virtue of the Act of the Dominion of Canada,
passed 26th May, A.D. 1874, being the "DOMINION CONTROVERTED
ELECTIONS ACT, 1874," and under all other powers vested in and
inherent in the Court.

It is ordered by the Court that—

I.

On the presentation of an Election Petition, there shall be left
with the Clerk of the Court, a copy thereof, to be sent to the
Returning Officer under section 8 of the Act.

II.

An Election Petition shall contain the following statements :—

1. It shall state the right of the Petitioner to petition within
section 7 of the Act.

2. It shall state the holding and result of the Election, and
shall briefly state the facts and grounds relied on to sustain the
prayer.

III.

The Petition shall be divided into Paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed of drawing or copying any Petition not substantially in compliance with this Rule unless otherwise ordered by the Court or Judge.

IV.

The Petition shall conclude with a Prayer, as for instance, that some specified person should be declared duly returned or elected, or that the Election should be declared void, or that a return may be enforced (as the case may be), and shall be signed by all the Petitioners.

v.

The following form, or one to the like effect, shall be sufficient.

IN THE COMMON PLEAS.

“The Dominion Controverted Elections Act, 1874,” Election
of a Member for the House of Commons for (*state the place*)
holden on the day A.D. 18 .

Dominion of Canada. } The Petition of A of
 Province of Ontario, } or of A of and of B of
 To Wit: } , (*as the case may be*) whose
 names are subscribed.

1. Your Petitioner A is a person (*or if more than one, say your Petitioners are persons*) who was (*or were*) duly qualified to vote at the above Election or claims to have had a right to be returned or elected at the above Election (*or was a candidate at the above Election*).
2. And your Petitioners state that the Election was holden on the _____ day of _____ A.D. _____ when AB, CD, and EF, were candidates, and the Returning Officer has returned AB, as being duly elected.
3. And your Petitioners say that (*here state the facts and grounds on which the Petitioners rely*).

Wherefore your Petitioners pray that it may be determined that the said AB was not duly elected or returned, and that the Election was void (or that the said EF was duly elected and ought to have been returned) *as the case may be.*

Signed,

A.

"

B.

VI.

Evidence need not be stated in the Petition, but the Court or a Judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial in the same way as in ordinary proceedings in the Superior Courts of Common Law, and upon such terms as to costs and otherwise, as may be ordered.

VII.

When a Petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of lawful votes, the party complaining of and the party defending the Election or return, shall each, fourteen days before the day appointed for trial, deliver to the Clerk of the Court and also at the address, if any, given by the Petitioners and Respondent (*as the case may be,*) a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the Clerk of the Court shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any heads of objection not specified in the list, except by leave of the Court or a Judge upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs or otherwise, as may be ordered.

VIII.

When the Respondent in a Petition under the Act, complaining of an undue return, and claiming the seat for some person, intends to give evidence to prove that the Election of such person was undue, pursuant to the 66th section of the Act, such Respondent shall fourteen days before the day appointed for trial, deliver to the Clerk of the Court and also at the address, if any, given by the Petitioner, a list of the objections to the Election upon

which he intends to rely. And the Clerk of the Court shall allow inspection and office copies of such list to all parties concerned ; and no evidence shall be given by a Respondent of any objection to the Election, not specified in the list, except by leave of a Judge of the Court, or, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs as may be ordered.

IX.

With the Petition, Petitioners shall leave at the office of the Clerk of the Court a writing, signed by them or on their behalf, giving the name of some person entitled to practise as an Attorney, or whom they authorize to act as their Agent, or stating that they act for themselves (*as the case may be*), and in either case giving an address within the City of Toronto, at which notices addressed to them may be left ; and if no such writing be left or address given, then, all notices and proceedings may be given and served by sticking up the same at the office of the Clerk of the Court.

X.

Any person returned as a member may, at any time before, or after presentation of a Petition against his return, send or leave at the office of the Clerk of the Court, a writing signed by him or on his behalf, appointing a person entitled to practise as an Attorney, to act as his Agent, in case there should be a Petition against him, or stating that he intends to act for himself, and in either case giving an address within the City of Toronto, at which notices may be left, and in default of such writing being left within a week after service of the Petition, notices and proceedings may be given and served respectively, by sticking up the same at the office of the Clerk of the Court.

XI.

The Clerk of the Court shall keep a book or books at his office in which he shall enter all addresses and names of Agents given under either of the preceding rules, which book shall be open to inspection by any person during office hours, without payment of any fee.

XII.

The Clerk of the Court shall, upon the presentation of the Petition, forthwith send a copy of the Petition to the Returning Officer, pursuant to section 8 of the Act, and shall therewith send the name of the Petitioner's Agent, if any, and of the address, if any, given as prescribed, and also the name of the Respondent's Agent, and the address, if any, given as prescribed, and the Returning Officer shall forthwith publish those particulars along with the Petition. The cost of publication of this and any other matter required to be published by the Returning Officer, shall be paid by the Petitioner, or person moving in the matter, and shall form part of the general costs of the Petition.

XIII.

The time for giving notice of the presentation of a Petition, shall be five days, exclusive of the day of presentation.

XIV.

Where the Respondent has named an Agent or given an address, the service of an Election Petition may be, by delivery of it to the Agent, or by posting it in a registered letter to the address given, at such a time that, in the ordinary course of post, it would be delivered within the prescribed time.

In other cases the service must be personal on the Respondent, unless a Judge, on an application made to him not later than five days after the Petition is presented, on affidavit shewing what has been done, shall be satisfied that all reasonable effort has been made to effect personal service, and cause the matter to come to the knowledge of the Respondent, in which case the said Judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable.

XV.

In case of evasion of service, the affixing in a conspicuous place in the office of the Clerk of the Court, a notice of the Petition having been presented, stating the Petitioner, the Prayer, and the fact that money has been paid into Court as security under the Act, shall be deemed equivalent to personal service, if so ordered by a Judge.

XVI.

All claims at law or in equity to money deposited, or to be deposited, for payment of costs, charges and expenses payable by the Petitioners, pursuant to section 8 of the Act, shall be disposed of by the Court or a Judge.

XVII.

Money so deposited shall, if and when the same is no longer needed, for securing payment of such costs, charges and expenses, be returned or otherwise disposed of as justice may require, by rule of the Court or order of a Judge.

XVIII.

Such rule or order may be made after such notice of intention to apply, and proof that all just claims have been satisfied or otherwise sufficiently provided for, as the Court or Judge may require.

XIX.

The rule or order may direct payment, either to the party who deposited the same, or to any person entitled to receive the same.

XX.

Upon such rule or order being made, the amount may be paid by the Clerk of the Court.

XXI.

The Clerk of the Court shall keep a book open to inspection of all parties concerned, in which shall be entered from time to time, the amount and the Petition to which it is applicable, which book may be inspected without payment of any fee.

XXII.

The Clerk of the Court shall make out the Election list. In it he shall insert the names of the Agents of the Petitioners and Respondent, and the addresses to which notices may be sent (if any). The list may be inspected at any time during office hours, and shall be put up for that purpose on a notice board appropriated to proceedings under the said Act, and headed "The Dominion Controverted Elections Act, 1874."

XXIII.

The time and place of the trial of each Election Petition shall be fixed by the Court, and notice thereof shall be given in writing by the Clerk of the Court, by affixing the same in some conspicuous place in his office, sending one copy by the post to the address given by the Petitioner, another to the address given by the Respondent (if any) and a copy by the post to the Sheriff, fifteen days before the day appointed for the trial : the Sheriff shall forthwith publish the same in the Electoral Division.

XXIV.

The affixing of the notice of trial at the office of the Clerk of the Court shall be deemed and taken to be notice in the prescribed manner within the meaning of the Act, and such notice shall not be vitiated by any miscarriage of, or relating to, the copy or copies thereof to be sent as already directed.

XXV.

The notice of trial may be in the following form :—

IN THE COMMON PLEAS.

“The Dominion Controverted Elections Act, 1874,” Election Petition of (name the Electoral Division). Take notice that the above Petition (or Petitions) will be tried at _____ on the _____ day of _____ and on such other subsequent days as may be needful.

Dated the _____ day of _____ A.D. 18 .
By order,
(Signed) _____ A.B.
C. C. & P., C. P.

XXVI.

At any time after an Election Petition is filed, either party by order of the Court or a Judge, may have production and inspection of all books, lists, commissions, ballots, certificates, statements papers, documents, and returns, whatsoever, relating to the Election, returned to or in possession of the Clerk of the Crown in Chancery, at such place and in such manner, and upon such terms as the Court or Judge shall direct. And for the purpose of such

production and inspection, and for the purposes of the trial of the Election Petition, the Clerk of the Crown in Chancery shall deliver or transmit as and when directed by Rule of Court or Judge's order, the said books, lists, commissions, ballots, certificates, statements, documents, papers, and returns, in such manner and to such officer as by Rule of Court or Judge's order shall be directed.

The said books, lists, commissions, ballots, certificates, statements, documents, papers, and returns to be returned to the custody of the Clerk of the Crown in Chancery after the trial of the Petition, or after the purpose has been served for which their delivery or transmission was required.

XXVII.

A Judge may from time to time, by order made upon the application of a Party to the Petition, or by notice in such form as the the Judge may direct to be sent to the Sheriff, postpone the commencement of the trial to such day as he may name, and such notice when received, shall be forthwith made public by the Sheriff.

XXVIII.

In the event of the Judge not having arrived at the time appointed for the trial, or to which the trial is postponed, the commencement of the trial shall, *ipso facto*, stand adjourned to the ensuing day, and so from day to day until the arrival of the Judge.

XXIX.

No formal adjournment of the Court for the trial of an Election Petition shall be necessary, but the trial is to be deemed adjourned and may be continued from day to day, until the enquiry is concluded ; and in the event of the Judge who begins the trial being disabled by illness or otherwise, it may be recommenced and concluded by any other of the Judges.

XXX.

The application to state a special case may be made a Rule in the Court when sitting, or by a summons before a Judge upon hearing the parties.

XXXI.

All affidavits and papers in any Election matter in Court, or in any Court for the trial of an Election Petition, may be entitled as follows :—

IN THE COMMON PLEAS.

“THE DOMINION CONTROVERTED ELECTIONS ACT, 1874.”

Election of a Member of the House of Commons for (*name the Electoral Division.*)

Dominion of Canada.

Province of Ontario.

To Wit :

}

XXXII.

An officer shall be appointed for each Court for the trial of an Election Petition, who shall attend at the trial in like manner as the Clerks of Assize and of Arraignment attend at the Assizes. Such Officer may be called the Registrar of that Court. He, by himself, or in case of need his sufficient Deputy, shall perform all the functions incident to the officer of a Court of Record, and also such duties as may be prescribed to him.

XXXIII.

The reasonable costs of any witness shall be ascertained by the Registrar of the Court, and the certificate allowing them shall be under his hand.

XXXIV.

The order of a Judge to compel the attendance of a person as a witness may be in the following terms :

Court for the trial of an Election Petition for (*complete the title of the Court*), the day of

To A. B. (*describe the person*). You are hereby required to attend before the above Court at (*place*) on the day of , at the hour of (*or forthwith, as the case may be*), to be examined as a witness in the matter of the said Petition, and to attend the said Court until your examination shall have been completed.

As witness my hand,

A. B.,

Judge of the said Court.

XXXV.

In order to the commitment of any person for contempt, the warrant may be as follows :—

At a Court holden on _____ at _____ for the trial of
an Election Petition for the (*here name the Electoral Division*),
before the Honourable _____ and one of the Judges
pursuant to the “Dominion Controverted Elections Act, 1874.”

Whereas A. B. has this day been guilty, and is by the said Court adjudged to be guilty, of a contempt thereof;—The said Court does therefore sentence the said A. B. for his said contempt to be imprisoned in the Gaol for , and to pay to Our Lady the Queen a fine of \$, and to be further imprisoned in the said Gaol until the said fine be paid. And the Court further orders that the Sheriff of the said County (*or as the case may be*), and all constables and officers of the Peace of any County or Place where the said A. B. may be found, shall take the said A. B. into custody, and convey him to the said Gaol, and there deliver him into custody of the Gaoler thereof to undergo his said sentence. And the Court further orders the said Gaoler to receive A. B. into his custody, and that he shall be detained in the said Gaol in pursuance of the said sentence.

[illegible]

XXXVI.

Such warrant may be made out and directed to the Sheriff or other person having the execution of process of the Superior Courts, as the case may be, and to all Constables and Officers of the Peace of the County or place where the person adjudged guilty of contempt may be found; and such warrant shall be sufficient without further particularity, and shall and may be executed by the persons to whom it is directed or any or either of them.

XXXVII.

All interlocutory questions and matters shall be heard and disposed of before a Judge, who shall have the same control over the proceedings under "The Dominion Controverted Elections Act, 1874," as a Judge in Chambers in the ordinary proceedings of the Superior Courts.

XXXVIII.

Notice of an application for leave to withdraw a Petition shall be in writing and signed by the Petitioners or their Agent. It shall state the ground on which the application is intended to be supported.

The following form shall be sufficient —

IN THE COMMON PLEAS.

“THE DOMINION CONTROVERTED ELECTIONS ACT, 1874.”

(Name the Electoral Division) Petition of (state Petitioner) presented day of The Petitioner proposes to apply to withdraw his Petition upon the following ground (here state the ground), and prays that a day may be appointed for hearing his application.

Dated this day of A.D. 18

(Signed)

XXXIX.

The notice of application for leave to withdraw shall be left at the office of the Clerk of the Court.

XL.

A copy of such notice of the intention of the Petitioner to apply for leave to withdraw his Petition shall be given by the Petitioner to the Respondent and to the Returning Officer, who shall make it public in the Electoral Division to which it relates; and shall be forthwith published by the Petitioner in at least one newspaper published or circulating in the place, if any.

The following may be a form of such notice :—

IN THE COMMON PLEAS.

“THE DOMINION CONTROVERTED ELECTIONS ACT, 1874.”

In the Election Petition for in which is Petitioner, and Respondent.

Notice is hereby given, that the above Petitioner has on the day of lodged at the office of the Clerk of the Court notice of an application to withdraw the Petition, of which notice the following is a copy (set it out). And take notice that, by the

rule made by the Judges of the said Court of Common Pleas, any person who might have been a Petitioner in respect of the said Election may, within five days after publication by the Returning Officer of this notice, give notice in writing of his intention on the hearing, to apply for leave to be substituted as a Petitioner.

(Signed)

XXI.

Any person who might have been a Petitioner in respect of the Election to which the Petition relates, may, within five days after such notice is published by the Returning Officer, give notice in writing signed by him, or on his behalf, to the Clerk of the Court, of his intention to apply at the hearing to be substituted for the Petitioner, but the want of such notice shall not defeat such application, if in fact made at the hearing.

XLII.

The time and place for hearing the application shall be fixed by a Judge, and whether before the Court or before a Judge, as he may deem advisable, but shall be not less than a week after the notice of the intention to apply has been given to the Clerk in manner as hereinbefore provided ; and notice of the time and place for the hearing, shall be given to such person or persons, if any, as shall have given notice to the Clerk of the Court of an intention to apply to be substituted as Petitioners, and otherwise in such manner and at such times as the Judge directs.

XLIII.

Notice of abatement of a Petition by death of the Petitioner or surviving Petitioner, under section 56 of the said Act, shall be given by the party or person interested, in the same manner as notice of an application to withdraw a Petition ; and the time within which application may be made to the Court or Judge by motion or summons of a Judge to be substituted as a Petitioner, shall be one calendar month, or such further time as, upon consideration of any special circumstances, the Court or Judge may allow.

XLIV.

If the Respondent dies, or is summoned to Parliament as a Member of the Senate, or if the House of Commons have resolved that his seat is vacant, any person entitled to be a Petitioner, under the Act in respect of the Election to which the Petition relates, may give notice of the fact in the Electoral Division, by causing such notice to be published in at least one newspaper published or circulating therein, if any, and by leaving a copy of such notice signed by him, or on his behalf, with the Returning Officer, and a like copy with the Clerk of the Court.

XLV.

The manner and time of the Respondent giving notice to the Court that he does not intend to oppose the Petition, shall be by leaving notice thereof in writing at the office of the Clerk of the Court, signed by the Respondent, six days before the day appointed for trial, exclusive the day of leaving such notice.

XLVI.

Upon such notice being left at the office of the Clerk of the Court, he shall forthwith send a copy thereof by the post to the Petitioner or his Agent, and to the Sheriff who shall cause the same to be published in the Electoral Division.

XLVII.

The time for applying to be admitted as a Respondent in either of the events mentioned in the 57th section of the Act, shall be within ten days after such notice is given as hereinbefore directed, or such further time as the Court or a Judge may allow.

XLVIII.

Costs shall be taxed by the Clerk of the Court, or, at his request, by any Master of a Superior Court, upon the rule of Court, or Judge's order, by which the costs are payable, and costs when taxed may be recovered by execution issued upon the rule of Court, ordering them to be paid, or, if payable by order of a Judge, then, by execution upon such order, or in case there be

money in Court available for the purpose, then to the extent of such money by order of the Court or a Judge. The office fees payable for inspection, office copies, enrolment, and other proceedings under the Act and these rules, shall be the same as those payable, if any, for like proceedings according to the present practice of this Court.

XLIX.

An Agent employed for the Petitioner or the Respondent shall forthwith leave written notice at the office of the Clerk of the Court, of his appointment to act as such Agent, and service of notices and proceedings upon such Agent shall be sufficient for all purposes.

L.

At the time appointed for the trial of any Election Petition, the Petitioner shall leave with the Registrar, for the use of the Judge, at the trial, fairly written on one side of the paper only—a copy of the Petition and of all the proceedings thereon, which shew the several matters to be tried, including the particulars of objection on either side, the correctness of which copy, in so far as the proceedings are filed with the Clerk of the Court, shall be certified by the said Clerk. The Judge may allow amendment of the said copy, or in default of such copy being delivered, the Judge may refuse to try the Petition or may allow a further time for delivery of the copy, or may adjourn the trial, in every case upon such terms, as to costs and otherwise, as the Judge shall see fit to impose.

LI.

After the trial of any Election Petition the Judge shall return to the Clerk of the Court the evidence and proceedings before the said Judge and his finding on the said Petition.

LII.

No proceedings under "The Dominion Controverted Elections Act, 1874," shall be defeated by any formal objection.

LIII.

Any rule made or to be made in pursuance of the Act shall be published by a copy thereof being put up in the office of the Clerk of the Court.

ADAM WILSON, C. J.
JOHN W. GWYNNE, J.
THOMAS GALT, J.

*As of Michaelmas Term, 42nd Victoria, Saturday, 14th
December, A.D. 1878.*

IT IS ORDERED by the Judges of the Courts of Queen's Bench and Common Pleas, by virtue of the Statutory powers and authority which they possess and exercise, and by virtue of the other powers and authority which the said Courts jointly or severally possess and exercise, to make rules and orders for the effectual execution of "The Dominion Controverted Elections' Act, 1874," and of any other Act of the Dominion Parliament, connected with or relating to Controverted Elections, or to corrupt or other illegal practices at said Elections, or at any prior Election, or to enquiries which may be made into or in any way concerning the same, that the procedure in the said Acts, and in each of them, respectively enacted and provided in the cases above mentioned, and in each and every of them, shall be the course of procedure in such cases in these Courts, in all respects as if the said procedure had been and was, as it now is specially provided for, prescribed and regulated by the said Courts, and by each of them, in the like manner and to the like tenor and effect as the said procedure in such cases is prescribed and enacted by the said respective Acts.

JOHN H. HAGARTY.
ADAM WILSON.
JOHN W. GWYNNE.
THOMAS GALT.
J. D. ARMOUR.
M. C. CAMERON.

MEMORANDA.

During Michaelmas Term the following gentlemen were called to the Bar :—

FREDERICK PIMLOTT BETTS, WILLIAM BARTON NORTHRUP, JAMES ALBERT MANNING AIKINS, EDMUND LINDSAY DICKINSON, ALBERT JEFFREY, WALTER MACDONALD, DUNCAN DENIS RIORDAN, WILLIAM HENRY BEST, THOMAS ROLLO SLAGHT, BARTLE EDWARD BULL, JOHN BALL DOW, ROBERT HODGE.

HILARY TERM, 42 VICTORIA, 1879.

*From February 3rd to February 18th.**Present :*

THE HON. ADAM WILSON, C. J.

“ “ THOMAS GALT, J. (a)

RYAN v. RYAN.

Statute of Limitations—Possession as caretaker or agent—Subsequent entry of owner—Tenancy at will—Evidence.

The plaintiff's father, who lived in the township of Tecumseh, owned a block of 400 acres of land, consisting respectively of lots 1 in the 13th and 14th concessions of the township of Wellesley. In 1849, the father offered the plaintiff his choice of 100 acres of the block, if he would go and live on it, and take care of the rest of the block for him. The plaintiff agreed to this, and selected the south half of lot 1 in the 13th concession, and lived thereon, taking care of the residue of the block. In November, 1864, the plaintiff sold his 100 acres, and in December following, having to give up possession to the purchaser, moved on to the north half of this lot 1, where he had resided ever since. In January, 1877, the father died, having, by his will, devised the north half of this north half to the defendant, another son, and the south half of this same north half to the plaintiff. The defendant, claiming such north half of the north half under the devise to him, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by possession. The learned Judge at the trial found that the plaintiff entered into possession, and so continued, merely as his father's caretaker and agent, and he entered a verdict for the defendant. Evidence was also given, and is set out in the report, which, it was urged, shewed an entry on the land within the last seven years, and thereby created a new starting point for the statute, and a new tenancy at will, but there was no finding on this point. On motion to enter a verdict for the plaintiff,

Per WILSON, C. J., the evidence shewed that the plaintiff was in possession, claiming adversely to, and not as caretaker and agent of his father; and the subsequent entry was not proved.

(a) On the 14th January, 1879, the Honourable Mr. Justice GWYNNE was appointed a puisne Judge of the Supreme Court of Canada. No appointment was made to the vacancy in this Court until after the expiration of this term, when on the 5th March, 1879, the vacancy was filled by the appointment of FEATHERSTONE OSLER, Esquire, as a puisne Judge of the said Court.

Per GALT, J., the evidence established the subsequent entry, and the creation of a new tenancy at will within ten years. The Court being equally divided, the rule dropped, and the verdict stood; but to enable the case to be appealed, the rule was directed to be discharged.

TRESPASS to the north half of lot No. 1, in the 13th concession of Wellesley.

Pleas :

1. Not guilty.
2. Land not the plaintiff's.
3. Land the freehold of the defendant.
4. Acts done by leave of the plaintiff.

Issue.

The cause was tried before Hagarty, C. J., without a jury, at Berlin, at the Fall Assizes of 1878.

The question was one between two brothers. The defendant was the devisee of the portion of the north half of the north half of the lot, containing fifty acres, which was the only part of the north half which was in dispute. The father, who lived in the township of Tecumseh, had allowed the plaintiff to occupy 100 acres of 400 acres, consisting of lot 1 in the 13th concession, and lot 1 in the 14th concession, which he owned in the township of Wellesley; and the plaintiff was to look after the 400 acres and to pay the taxes upon them, but to take what timber he required for his own use, or to help him to pay the taxes, but not to give the timber to any one else or allow any one else to take it. He settled in 1849 upon the south half of lot 1, in the 13th concession.

In November, 1864, he sold that 100 acres to one Martin Kennedy. The plaintiff's father had made a deed to him in 1859, but his mother did not sign it until 1864, when he sold to Kennedy.

Soon after that, about December following, having to give the purchaser possession of the south 100 acres, he moved on to the north half of the lot, or, as the defendant contended, only on the south half of the north half of the lot; and he had remained there ever since.

The father died early in January, 1877, devising the

north half of the north half, the land in dispute, to the defendant, and the south half of the north half, not in dispute, to the plaintiff. The defendant claiming the north fifty acres of the lot by the father's will, entered upon it, which was the cause of action in this suit.

The questions were, whether the plaintiff had ever had possession in law of more than the south fifty acres of the north hundred acres; and also whether he was ever more than a mere caretaker and servant of his father. If either of these questions were decided against him he failed.

The evidence, so far as is material, will sufficiently appear in the judgments of the Court.

The learned Chief Justice found as follows:—

“The difficulty arises as to the effect of the occupation for over ten years before the bringing of the action, and that will require serious consideration. The claim to the fifty acres seems very unjust. The plaintiff never was promised more than 100 acres, which he got and sold in 1859,” (should be he got a deed in 1859 and sold in 1864) “and his father, as I understand, devised the south fifty acres of the north half lot to him in addition. Whatever occupation the plaintiff had of the land was acting as agent and caretaker for his father, and, as between the father and a stranger, I think the plaintiff's possession would be the father's possession.

“On the evidence it seems the father used to send up money to pay the taxes till seven or eight years ago. He then said, knowing the plaintiff was using it, that he must pay the taxes for the use of the land.

“I find as a fact that the plaintiff down to his father's death in 1877 did not occupy or claim the land as his own against his father, but merely as acting for him, living on the south fifty acres, and using the north fifty acres in dispute clearing some of it, taking timber off some part, and protecting it.

“Within the ten years it is sworn by the defendant that he was sent by the father to complain to the plaintiff of

his cutting timber, and he told the plaintiff so, who promised to forbear and to pay the taxes if he were left on the place until the father would want it."

The learned Chief Justice thereupon entered a verdict for the defendant.

In Michaelmas term, November 19, 1878, *Ward Bowlby* obtained a rule calling on the defendant to shew cause why the verdict for the defendant should not be set aside, and a verdict entered for the plaintiff for such amount as the Court might think the plaintiff entitled to, pursuant to the Administration of Justice Act, and to the leave reserved at the trial, on the ground that the verdict was contrary to law and evidence, for that the plaintiff established a title by the Statute of Limitations.

During the same term, November 29, 1878, *McCarthy*, Q.C., and *King* (Berlin), shewed cause. The plaintiff's title, if he has one, is by possession. The defendant's title is as devisee of his father, the patentee of the land. The plaintiff said he took possession of the whole north half of the lot. The defendant says the plaintiff took possession only of the south fifty acres of the north half, and the defendant does not dispute the plaintiff's title to these fifty acres. The plaintiff is the devisee of the south fifty acres if he choose to claim under his father's will. The dispute is confined to the north quarter of the lot. The plaintiff and defendant are brothers. The plaintiff, in 1849, was promised 100 acres by his father of a block of 400 acres which the father had in Wellesley, lot 1 in the 13th concession, and lot 1 in the 14th concession. The plaintiff in that year went into possession of the south half of lot 1 in the 13th concession, and he was to take care of the other 300 acres for his father, and to pay the taxes upon the whole 400 acres. He was also to preserve the timber of the land against trespassers, but to take from it such timber as he required for his own use. The plaintiff afterwards sold the 100 acres he selected, and his father made a deed of it to the purchaser. In December, 1864, after

that sale, he says he moved on to the north half of the lot, but as the defendant says only on to the south half of the north half, still as agent and caretaker for his father of the land he moved upon as well as of the other unsold lands of his father, and he was as before to pay the taxes of that land as also of the other land held by his father. The plaintiff never was a tenant, but a caretaker and agent only, acknowledging all along, until two years ago, that that was the nature of his occupation or possession, and the statute does not affect the title of the true owner when there is an occupation or possession of that kind : *Doe dem. Perry v. Henderson*, 3 U. C. R. 486 ; *Doe dem. Quinsey v. Caniffe*, 5 U. C. R. 602 ; *Doe dem. Silverthorn v. Teal*, 7 U. C. R. 370 ; *Heyland v. Scott*, 19 C. P. 165 ; *Ellis v. Crawford*, 5 Ir. L. R. 402 ; *Moore v. Doherty*, 5 Ir. L. R. 449. If the plaintiff can be considered a tenant or occupier, it was only of the south half of the north half, and that part is not in dispute. If he is to be considered as in possession of the north quarter, which is in dispute, he was there as his father's tenant, and the taxes he paid upon that quarter and upon the other lands of his father was as rent for the north quarter, and the time never began to run until shortly before the action, so that no title has been acquired under the statute : *Young v. Elliott*, 25 U. C. R. 330 ; *Heyland v. Scott*, 19 C. P. 165 ; *Mulholland v. Conklin*, 22 C. P. 372 ; *Hemmingway v. Hemmingway*, 11 U. C. R. 237 ; *Keffer v. Keffer*, 27 C. P. 257 ; *Day v. Day*, L. R. 3 P. C. 751, 761 ; *Locke v. Matthews*, 13 C. B. N. S. 753, 760 ; *Allen v. England*, 3 F. & F. 49 ; *Doe dem. Edney v. Benham*, 7 Q. B. 976. And if there was a tenancy, it was at will only, and that was put an end to by the defendant after his father's death entering as devisee and owner of it, and making a new arrangement with the plaintiff to work the land or part of it in common with the defendant, which agreement was acted upon, by both two brothers working upon the land. They also referred to *Doe dem. Corbyn v. Bramston*, 3 A. & E. 63, 66 ; *Doe dem. Milburn v. Edgar*, 2 Bing. N. C. 498 ; *Dundas v. Johnston*, 24 U. C. R. 547.

Ward Bowlby, contra. The only question is, whether the plaintiff took possession in December, 1864, and kept that possession for a year, that is, until December, 1865? *Truesdell v. Cook*, 18 Grant 532, shews the father may be barred by just such a possession as the plaintiff had for the statutory time. When the plaintiff took possession of the north half in December, 1864, it was not then wild land, as it had been leased to one Richardson before that, who built a house upon it, and cleared a part of it. The plaintiff took possession when he entered of the north hundred acres, and not merely of the south fifty acres of the north half of the lot. The evidence shews that plainly. The plaintiff entered either as a trespasser or tenant at will, and in either case he has a legal title, as he has paid no rent. He referred, in addition to the cases already cited, to *McArthur v. McArthur*, 14 U. C. R. 544; *Davis v. Henderson*, 29 U. C. R. 344; *Orr v. Orr*, 21 Grant 397; *Williams v. McDonald*, 33 U. C. R. 433; *Rumrell v. Henderson*, 22 C. P. 180; *Gray v. Richford*, 1 App. 112; *Brown on Limitations as to Real Property*, 96, 98, 103, 118, 140, 141.

February 11, 1879. WILSON, C. J.—The learned Chief Justice decided that the plaintiff never had a possession in himself in the land independently of his father, the titular owner; but that he was a mere caretaker and agent of his father—the occupier holding it for his father.

There are many cases in which an occupancy may exist. A gatekeeper or gardener may have the use of a house from his employer; and a servant may also have an occupation from his master, without dispossessing the owners, if, while they so hold, they are rendering their services to the owner. The possession of the solicitor is the possession of the client, and that of the receiver the possession of whomsoever may be entitled to the property. And a caretaker or agent may be turned out without a demand to give up possession: *Ward v. Carttar*, L. R. 1 Eq. 29; *Doddem Willis v. Birchmore*, 9 A. & E. 662; *Ellis v. Crawford*, 5 Ir. L. R. 402; *Moore v. Doherty*, 5 Ir. L. R. 449;

Doe dem Perry v. Henderson, 3 U. C. R. 486; *Wrixon v. Vize*, 3 Dr. & War. 104; *Bertie v. Beaumont*, 16 East 33.

An owner who allows an adjoining proprietor to have the use of a piece of land to keep the boys out of it, so long as the adjoining proprietor did so, and such proprietor did not reside upon it, but used it only as part of his garden, was not entitled to set up the twenty years of his occupation in that manner as a bar, because the owner visited such proprietor every year or two, and went upon the land in question with him, and gave him directions as to pruning the trees and repairing the fences: *Allen v. England*, 3 F. & F. 49.

In this case the plaintiff went on the land, or some part of it, which is in dispute, without his father's knowledge or consent. He told his father he was going to take possession of the land, and he did so.

There is evidence that his father afterwards assented to it. There is evidence that his father was always opposed to it. He cleared the land, sowed it, and took the profits to his own use. He was allowed to take timber for his own purposes, but his father complained of his taking too much, or of selling it to others. He built a house and out-houses upon it, and was assessed for it. He says he paid the taxes upon this land, but that is denied, and it appears he was to go off the land whenever his father desired it, although the plaintiff seems to have thought he would never be disturbed. All that he was to do for this possession was to look after his father's other land to see that no one cut the timber upon it.

He was not, in my opinion, his father's servant or agent as to the land which he held in possession. He was a trespasser, if he were there wrongfully, or a tenant at will if he were there rightfully; but he was not a caretaker of that land. He and he alone was in the sole and beneficial occupation of it. The father directed nothing to be done by the plaintiff to the land but to save the timber. He did not control the plaintiff as one would a servant, agent, or caretaker. On the contrary, there is evidence he told

the plaintiff to build on the land, to do his best with it, and to bring up his family upon it.

I think there is no evidence that a person upon such facts can be made out to be a servant, agent, or caretaker, so that his possession remained in law all along the possession of his father, and that if he continued there for fifty years upon the same terms he nevertheless would have had no possession in law, but the possession would still have been that of the father only. The plaintiff could not have been turned out without a demand first made upon him to give up possession, and that shews he was not a mere caretaker: *Ellis v. Crawford*, 5 Ir. L. R. 402; *Truesdell v. Cook*, 18 Grant 532.

It is disputed whether the plaintiff was to have paid the taxes upon the other land. He says he never agreed to do so, but he paid them when he had money, and when he had not his father paid them. It does not appear he paid them after 1864 or 1865. The defendant's evidence is that he did not. If that be so, even if the taxes can be considered as a rent, there is no evidence of any such payment within the limit of the ten years. That point was not considered either at the trial or upon the argument before us.

The learned Chief Justice, at the close of his opinion upon the evidence, referred to that part of it in which it appears the defendant, who said he was sent by his father, complained of the plaintiff cutting timber,—that the plaintiff promised to forbear and to pay the taxes if he were left upon the land until his father wanted it.

He has found nothing upon these facts, assuming them for the purpose of the opinion to be so. He has merely stated them.

The case has been argued as if a finding or decision had been made upon these facts adversely to the plaintiff, and as the parties have so treated the case I shall deal with it in the like manner, and more especially because I think the learned Chief Justice would most likely have found these matters to be facts, and upon such facts would have found for the defendant.

The first question then is, whether the plaintiff was a trespasser or a tenant at will?

Taking the evidence for the plaintiff, it appears he determined to move to the north hundred acres after his sale of the south hundred to Kennedy, without consulting his father. Kennedy states this fact; and the plaintiff himself says he wrote to his father telling him he meant to move to it, and that his father, who wrote to him about a month afterwards, did not object to it. The after events shew the plaintiff was not really considered as a trespasser, although the evidence for the defendant states very strongly that the father never assented to the plaintiff going to the north half of the lot, and that he even positively objected to it, and was always trying by his directions, but not by any compulsory means, to get the plaintiff off the land. But that is quite set at rest by the defendant's own declaration, that the plaintiff "was to go off any time my father wanted it: that arrangement continued from the time he went on until my father died."

The general body of evidence sustains that view of the case.

It is quite clear to me then the plaintiff was not a trespasser and wrongdoer from the first. If he were to be considered so it would not prejudice the plaintiff's claim, but it would seriously endanger the defendant's rights.

I shall consider the plaintiff then as a tenant at will to his father from the time he entered upon the land on the 3rd of December, 1864.

Of what part of the north hundred acres was he the tenant at will? Was it only of the south fifty acres of the north hundred, or was it of the whole north hundred acres? If it were only of the south fifty acres, then the verdict as to the north fifty acres must stand for the defendant, and the verdict for the south fifty acres must be entered for the plaintiff, as the defendant has and makes no claim to that part of the land. The plaintiff, if he lose the north fifty acres, will then have no difficulty in taking the south fifty acres under his father's will, to which portion he has an unquestioned right if he accept of the devise.

It is only the north fifty acres it will be remembered which are really in dispute, although the action is brought for trespass to the whole hundred acres. The plaintiff when he left the south hundred acres which he had sold to Kennedy, moved into a house which stood on the south fifty acres of the north half lot. He began to clear upon the north fifty acres, when he moved to the new place, and he has continued clearing occasionally from that time until lately. He fenced his clearing in, and cultivated it, and applied the crops and profits to his own use. He built a barn and stable—the stable entirely on the north fifty acres, the barn partly on the north and partly on the south fifty acres. He has cut the timber off the whole north half lot all that time for his firing, fencing, and peeling bark. He has given leave to others to cut timber there. He has made sugar upon it. He has threatened to impound cattle which were upon it, and he has also been assessed for it, and, in my construction of the evidence, he has paid the taxes upon it, and he certainly has done the statute labour for it. He did everything with the whole north half lot, and he used it every way which the owner of it could have done. In my opinion he was in possession of the whole of that half lot.

Finding then that the plaintiff was tenant at will to the father of the north fifty acres in dispute, as well as of the south fifty acres of the same north half lot, from December, 1864, the next question is, whether the plaintiff has had possession of the disputed fifty acres for a period of ten years from one year from December, 1864, that is, until December, 1875, and his father has been dispossessed for the same period? I name these dates without continuing the time to a period after December, 1875, because if the plaintiff's possession were broken at all and the father's possession restored, these events happened about seven years before the trial, and the plaintiff's possession subsequent to December, 1875, would not affect the case.

If the plaintiff's possession were put an end to between December, 1865, and December, 1875, by his becoming tenant at will again to his father, and it is not said it was

put an end to in any other manner, then the plaintiff, as to the disputed fifty acres, fails in his action. If it was not he is entitled to the verdict. That question depends entirely upon the evidence. And I will take the evidence of the defence alone, so as to give the defendant the full benefit of it.

The defendant said : "I was sent about seven years ago by my father to tell the plaintiff to stop cutting the timber, and if he would not pay the taxes, father said he would give it to somebody else. I saw Michael and told him this. The plaintiff said he would not destroy any more timber, and that he would pay the taxes if he was left on the place until such time as we would want it. * * I was present when my father told them to leave when they got another place. * * He did not say the plaintiff should leave it right away, but as soon as he got another place. * * I heard my father tell him on more than one occasion to leave it. He was to go off any time my father wanted it. That arrangement continued from the time he went on until my father died."

Thomas Ryan said : "I do not think my father ever intended to give the place to the plaintiff. He thought as the plaintiff had so large a family it would be too hard to put him off it. My father said he could not die easy if he turned the plaintiff off. * * The plaintiff was always grumbling the place did not pay him for his work. My father said to him if it did not pay him for the work and taxes he ought to leave it. I remember my father telling him that at different times."

Thomas Clark, who was present with the defendant at the conversation about seven years ago, said : "The defendant told the plaintiff he wanted plaintiff to leave. The plaintiff said all he wanted was an acre for a corner to build a house for his family, and he would leave the place. The defendant said to the plaintiff his father had sent him to get plaintiff off the place. The plaintiff said he could not make it off the place ; he was ready to go if he got the acre off the south half of the north half. The defendant said if the plaintiff could not pay the taxes and do the road.

work it was time for him to leave the place. The plaintiff said he could not pay the taxes. He did not say whether he would pay the taxes or would not. That is the way it was left."

At no time does it appear the father ever told the plaintiff to leave the land absolutely. He told him at different times to leave, according to the evidence, "as soon as he got another place," or "whenever the father wanted it," or "if it did not pay him for the work and taxes."

It is scarcely likely he would have done so when he said, "it would be hard to put the plaintiff off, he had so large a family," and that "he would not die easy if he turned the plaintiff off."

Thomas Clark's evidence is quite opposed to that of the defendant. According to Clark, when the defendant told the plaintiff that the father had directed him, the defendant, to get the plaintiff off the place, the plaintiff said "he was ready to go if he got the acre off the south half of the north half," and when the defendant said if the plaintiff could not pay the taxes and do the road work it was time for him to leave, the plaintiff said "he could not pay the taxes," and Clarke adds, "He did not say whether he would pay the taxes or would not. That is the way it was left."

That is no evidence of a new tenancy at will having been created between the parties; firstly, because the plaintiff refused to leave unless he got the acre of land he asked; and secondly, because he never promised to pay the taxes if he were left upon the land.

The defendant's own evidence, too, is in some respects not nearly so strong as Clark's. The defendant does not say he was sent to get the plaintiff off the place, or that he, the defendant, wanted the plaintiff to leave, as Clark stated, but only that "I was sent by my father to tell the plaintiff to stop cutting the timber, and if he would not pay the taxes *father said* he would give it to somebody else. I told Michael that."

But the defendant also said,—and this is the only important part of his evidence which can be construed into creating a new tenancy at will,—the plaintiff answered to

the above message the defendant delivered, "he would not destroy any more timber, *and that he would pay the taxes if he was left on the place until such time as we would want it.*"

That statement, as I have before mentioned, Clark denies, and the plaintiff does so too. The defendant, in a part of his cross-examination, said, "It is only seven years ago that my father sent me to tell him he was to pay the taxes: that he would have to pay the taxes on the north half. He never paid taxes on the land in the 14th concession. My father claimed he should do this for the use of the place." In his re-examination he said, "Since the plaintiff moved on to the place until seven years ago we were sending money to pay the taxes. We were sending up money to pay the taxes on the fifty acres in dispute. Seven years ago my father said the plaintiff was to pay the taxes on all."

He does not repeat that the plaintiff promised to do it.

Now as to the taxes on the north half. It is scarcely credible, after the letter of 14th January, 1865, that the father ever paid the taxes on the north half lot in question, because the plaintiff was assessed for that land, and he could always have been levied upon for the arrears. His own statement is, he paid all the taxes upon the north half since the year 1864, and it is just what we would suppose would be the case, because the plaintiff could have been compelled by force of a distress to pay them. I do not think the defendant then is correct when he says his father had to pay the taxes on that half lot.

It is observable, too, that while the father did not pay the taxes on the land in the 14th concession from the period of seven years before the trial, the plaintiff did not do so either, and the letter of 2nd March, 1876, refers to these taxes, and to the part of that land which had been sold, because nobody had paid the taxes upon it; and no blame is cast upon the plaintiff for not paying the taxes and letting the land be sold, which seems strange if any such agreement had been made as the defendant says there was, that the plaintiff should pay them.

The plaintiff says he never agreed to pay the taxes on the land he did not occupy: that his father told him he might cut timber to enable him to do it; and that he paid the taxes when he had the money, and when he had not the money, he would write to his father for it. That seems to me to be the most consistent with the general facts of the case.

If the plaintiff did promise to pay the taxes if he was left upon the land until it was wanted, upon receiving the message that he if he did not pay the taxes his father would give the land to somebody else, that would, I think, be some slight evidence of a tenancy at will being then created, inasmuch as the occupier was let remain upon the land, which would be evidence of the father's assent to the offer or proposition of the occupier: *Doe dem. Stanway v. Rock*, 4 M. & G. 30; *Locke v. Matthews*, 13 C. B. N. S. 753; *Hodgson v. Hooper*, 3 E. & E. 149.

But I am of opinion there is no such case proved, nor any such case found by the learned Chief Justice, and in the absence of such proof or finding, the plaintiff is in law entitled to the verdict.

I am quite sensible the plaintiff's claim is not a righteous one. He is setting it up against his father, who has all along dealt kindly by him, and who has left him a portion of the land by his will, because he could not bear that so large a family should want if not further helped.

But what are three-fourths of the cases which rest upon the law of prescription for title but cases of unfair dealing towards or imposition upon the kindness of the benefactor, or the indulgent proprietor?

No one can be glad when a case like that set out in *Doe dem. Baker v. Coombes*, 9 C. B. 714, is successful, or that of *Doe dem. Stanway v. Rock*, 4 M. & G. 30, and many others. And it is the conviction or impression of that injustice which has to be guarded against, as the natural tendency of it is to disturb the judgment.

There is no further point for discussion or argument than the one last mentioned, namely, whether the tenancy

at will which was determined in one year from December, 1864, when the statute began to run, was renewed between the father and the plaintiff at the time mentioned, seven years before the trial; and, as a fact, I am of opinion upon the evidence—for it is not a matter of law—it was not. It was neither proved, nor found as a fact.

If I am to pronounce my opinion upon the evidence which I think the learned Chief Justice should have pronounced: that opinion is, that the verdict should be entered for the plaintiff.

I have not referred to anything which took place between the parties, after December, 1875, because the circumstances throw no satisfactory light upon the matter, and because at that time the legal estate was then either with the plaintiff or the defendant, and nothing which was said or happened can, after December, 1875, affect that estate.

If the verdict stand it will be, of course, only for the north fifty acres, and the verdict will be entered for the defendant as to the south fifty acres.

GALT, J.—The following judgment was written by Mr. Justice Gwynne before his appointment to the Supreme Court, and as I thoroughly concur in it, I read and adopt it as my own:—

The whole question, as it appears to me, is one of fact and of inferences from facts, and which we have to decide as a jury should.

After the most careful consideration I have been able to give the evidence I have arrived at a conclusion unfavourable to the plaintiff's claim. It is proper therefore that I should point out those portions which have influenced my mind.

The plaintiff's father, owning 400 acres of land in a block in the township of Wellesley, and living himself in the township of Tecumseh, in 1849 promised to give to his son, the plaintiff, his choice of 100 acres of the block if he would go up and live on it, and protect the residue of the land from being stripped of the timber and from other tres-

pass. Upon this arrangement the plaintiff went up in 1849, and selected for himself the south half of lot No. 1 in the 13th concession, containing 100 acres, upon which he lived, taking charge of the block, until he sold in 1864 his own 100 for which his father gave him a deed. In 1863, he put one Richardson on the north half of the same lot as tenant of plaintiff's father, upon a clearing which at his father's expense and for his father he had made upon the north half, but as Richardson was cutting down the timber on the lot the plaintiff was obliged by his father's direction to remove him, and accordingly he did remove him in or about September, 1864.

There is no reason to doubt the truth of plaintiff's statement that in November, 1864, he wrote to his father informing him that it was his intention to move on to the north 100 acres of this lot from which Richardson had been removed, and asking for money to pay taxes; nor that, having received no answer to this letter, the plaintiff did with his family move on to it in December, 1864. The plaintiff, however, says that in January, 1865, he did receive a letter from his father, dated the 14th of that month, which he produced, and which he says was the only answer he received to his letter of November; and he says that in his letter of November he had not asked his father for the lot, nor had he intimated that he would like another 100 acres.

In the letter of the 14th January, 1865, his father informs the plaintiff that he would send him \$30 to pay the taxes, and that this was the last sum that he would pay for taxes until he should see further; and he adds, "As for you, you may whistle when you get a lot as handy as you got the last one."

Now the first question which arises is, in what character did the plaintiff in December, 1864, enter upon the north half of this lot No. 1 in the 13th concession—namely, was it the character of a trespasser, or of a tenant at will under his father, or as an agent merely and a caretaker of the land for him. As to the circumstances under which he had entered upon the south half of this same lot in 1849 the

plaintiff himself says, that his father told him to go up and take his choice of the 400 acres: that he told him to take 100 acres: that he picked out the south half of this lot 1, and lived upon it from 1849 until 1864. The agreement was, that he was to take care of the other land, to mind it, let no timber be cut off it, see that no timber was taken off it or harm done to it: that he himself was allowed to take timber for his own use, but he was not to give it to any one else, nor let any one else take it away.

Now, having written to his father in November, 1864, to the effect that he was going to move on to the north half, he cannot be regarded as having entered as a trespasser. That he had no reason to expect that his father would give him this north 100 acres also is apparent from the letter which he produced, and also from his own evidence. According to his own evidence nothing in writing passed between his father and him in answer to his letter of November, except the letter of 14th January, 1865, and nothing verbal whatever relative to his having entered upon the north half before Christmas, 1865, if it was not Christmas, 1866, which was the first occasion of plaintiff and his father having met after plaintiff had moved on to the lot in December, 1864. The plaintiff says, "I think I went down to see my father the next winter after I went on to it. Either my wife or I went down every second winter. I cannot tell which of us went down first to my father's after December, 1864. It was not more than two years after that that I went down myself." Then he says "I did not ask permission to move on. Before I moved I wrote a letter to my father that I was going to move. I know the substance of the letter that I sent to my father; it was that I had sold out the place, and was going to move on to the next one. I did not say how long I was going to stay there, nor what I was going to do on it. I went to get some money from him to pay the taxes. I had not asked him for this lot, nor had I intimated to him that I would like another 100 acres." Again, "I told him myself everything I was doing. I would tell him" (this is plainly

when he would go to see him every second winter) "when I had so much chopping or clearing done. *I would tell him every time I went down* He told me to take care of the place, and to let no one take timber off it. People had gone to him and complained that I was allowing too much timber to be taken off. My father complained I was allowing too much timber to be taken off the place. *He told me I could sell timber to pay the taxes*, but I was not to let others haul it away. Patrick came up since 1864. I remember Patrick coming up. He said he was sent to stop me cutting timber there. I cannot tell the year that was. It was not ten years ago, but something about six years ago. That is the time when he spoke to me in presence of Thomas Clark, that was about cutting the timber. It was about cutting too much timber, selling too much timber, and allowing too much timber to be taken away." And again, "I did not promise not to cut any more timber. I would not say but that if my father wanted it I would give it up. *I said that if my father wanted it I would give it up*. I cannot say whether I said that at all or not. I know it was in my mind that I would give it up."

Then the plaintiff's wife, who is called upon his behalf, says, "I remember coming to Tecumseh after we moved on. We had one crop before I went down. I went down in the winter of 1865. I think about Christmas, 1865. I saw the old man. He asked me if the lot we were living on was as dry as the lot we had been living on. He said we would have hard scratching now to clear,—to make a living on it. I told him it was not as dry. I told him what improvements we had made on it. I asked him for the loan of some money. He said that he could not give me any; that we would have to scratch away." And again, "I was down several times. I went down most every year. I was sometimes three weeks at a time in the house with the old man. I saw him every time I went. I told him about my husband's occupation of the north hundred. I said we would have to move off it; that nobody could make a living on it. I said it was not worth anything. The old man said it was too bad

some of them would not live on it. The little house that Richardson lived in was burnt. I told my father-in-law we would have to build a house and barn if we were to stay on it. I told him if we did not do better we would have to move off. He knew I was getting a bit of money from my father. He said to build and stay on it, and to keep my children on it. We stayed on it."

Now it is plain that it is not true what the plaintiff in a part of his examination in chief has said, that he has ever regarded this piece of land as his own from the time that he put Richardson in possession. Indeed the plaintiff's evidence cannot, in my opinion, be relied upon except where there is extracted from him evidence against his own interest.

The learned Chief Justice of the Queen's Bench, before whom this action was tried, without a jury, found as a fact that the plaintiff down to his father's death in 1877 did not occupy or claim to occupy the land for which this action is brought, on the north 50 acres of the north half of the lot, otherwise than as agent of his father, living on the south 50 acres of the north half, and protecting the north half, clearing some of it, taking timber off some of it, but in the character merely of agent of his father.

There is much in the above evidence, as it appears to me, in support of this finding. The plaintiff's own account, that he was authorized by his father to take timber for his own use, and to cut down timber to pay the taxes upon the block, and his account of his habit every time he would go down to his father, that is every year or every second year, of telling him everything he was doing, what he chopped, and the repeated injunction he received not to allow any stranger to take off any timber, seems to me to be very consistent with what would be natural and likely to occur in the case of a steward, caretaker, or agent giving an account of his stewardship, which was compensated by his being allowed to live on the south 50 acres, and by using the cleared part of the land for the support of his family.

I am not prepared to hold that a son might not occupy

land, as *the steward or agent* of his father under an arrangement of that description, and so that the statute of limitations should not begin to run against the father, but I do not think it necessary to hold that in this case the occupation of the plaintiff was only as steward or agent of his father; for assuming him to have been tenant-at-will of his father, even from his entry in December, 1864, if the evidence given upon the part of the defendant be true, and I see no reason to doubt it, there is, as it appears, abundant evidence the proper inference from which is that about six or seven years ago that tenancy was determined, and a new tenancy-at-will created between the plaintiff and his father.

Thomas Ryan was present at one or more of the conversations which the plaintiff had with his father relative to this place upon the occasions of plaintiff visiting his father at the latter's place in Tecumseh. Michael, as witness says, was always grumbling that the place was not paying for his work, and to this the father replied that if it did not pay him for the work and the taxes he ought to leave it. About eight years ago, that is in 1870, he heard his father tell plaintiff that if he was not satisfied that it would pay him for his work and pay the taxes to leave the place. He heard his father upon different occasions say this to plaintiff, and tell him that he had got one hundred acres, and that he did not intend to give him any more. His father also told witness he was going to send defendant up to prevent plaintiff destroying the timber, and that defendant went up; and that it is not eight years since the father sent defendant up.

The defendant himself says that about seven years ago his father sent him up to see the plaintiff about this lot: that he was sent up because plaintiff was cutting the timber and destroying the land. Now the plaintiff admits that some persons had told his father that he was cutting down the timber, and that his father complained of his doing so, and gave him special orders not to do so, unless for his own use on the place or to pay taxes. The defendant further says that his father's object in sending him up was to stop plain-

tiff cutting the timber, and to tell him that if he would not pay the taxes that his father would put somebody else on the land. The defendant accordingly went up and told all this to the plaintiff. The defendant saw a man hauling timber off the lot for rafters, and he forbid him. He forbade the plaintiff also selling or disposing of any timber off the place; and he told him that his father had sent him up to tell this to plaintiff; and that this interview resulted in the plaintiff promising that he would not destroy any more timber, and that he would pay the taxes if he was left on the place until such times as "us boys wanted it."

Now as to this interview, although the plaintiff says that upon the occasion referred to defendant was so drunk that he, plaintiff, could not understand what defendant said, nor could defendant understand plaintiff, yet he admits he may have said that he would give up the place if his father wanted it; but that he cannot swear whether he did or not say so. However he says that it was in his mind that if his father asked for it he would give it up. It was very natural therefore that he should have said so upon the occasion spoken of, and the defendant swears that he did.

Thomas Clarke, who was present upon the occasion, says, that defendant told plaintiff he wanted him to leave; that Michael said all he wanted was an acre on the south 50 acres of the north half, where his dwelling house was: that the defendant told plaintiff that their father had sent him up to get the plaintiff off the place. It appeared that the taxes had not been paid the year before: that the plaintiff said he could not make the taxes off the place, and defendant said if he could not pay the taxes and do the road work it was time for him to leave.

The plaintiff also admits that upon this occasion Patrick was sent up to stop the plaintiff cutting the timber.

Now it appears to me that there is no reason to doubt the truth of the evidence for the defence, and that there should be no difficulty in arriving at the following conclusions, namely, that about seven years ago the plaintiff, in violation of the express orders of his father, the owner of

the land, was cutting down or permitting to be cut down the timber upon the lot to the injury of the land, and that the father sent up the defendant in consequence as his agent with authority to enter upon the land on behalf of the father, and to remove the plaintiff therefrom, unless he should come to terms satisfactory to the father's agent: that accordingly the defendant did go up and did enter upon the land in assertion of his father's title, and did prevent persons who were cutting and taking timber from doing so, and that this entry and assertion of right was done by the authority of the father and enured to his benefit, and determined any tenancy-at-will then existing in virtue of which the plaintiff had then possession; and that thereupon the defendant saw the plaintiff and communicated to him that he had come up with power and authority to remove him, unless he would cease cutting timber and would pay the taxes, and that thereupon the plaintiff came to an understanding and agreement which was satisfactory to the defendant, as his father's agent, that if he was allowed to remain on the place until such time as his father or any person claiming under him should want the place, he would cut no more timber and would pay the taxes, and would give up the place whenever required so to do; and so that the proper inference to draw is that then a new tenancy-at-will under the father was created, to which new tenancy the plaintiff being permitted to continue thereafter upon the place is to be attributed, and that consequently the father's title was not barred in his lifetime; and I think what passed between the brothers after the father's death, the manner in which they dealt with the land, and the reference to arbitration, is more consistent, with this being the true state of the case than with the plaintiff having obtained a title by the Statute of Limitations, acting, as he would now seem to wish to represent, under advice throughout with that view.

All the authorities upon the subject are collected in *Keffer v. Keffer*, 27 C. P. 257. *Day v. Day*, L. R. 3 P. C. 751, there referred to is conclusive authority, if there were any doubt

upon the point, that an agreement for a fresh tenancy may be implied from acts and conduct, and that it is for the jury to say, and for us in this case acting as a jury to draw the inference if the acts be such as ought to satisfy a jury that the agreement was made.

In *Hodgson v. Hooper*, 3 E. & E. 149, it is said that whether a fresh tenancy is created or not is a question of fact, and the agreement for such fresh tenancy may be express or implied.

In *Doe dem. Groves v. Groves*, 10 Q. B. 486, the acts and conduct from which the Court there exercising the functions of a jury, as we are called upon to do, presumed the defendant to be a tenant-at-will of his stepson, the true owner, under a fresh tenancy-at-will within the statutory period, were that the stepson occasionally resided two or three weeks at a time on a visit with his mother and her second husband, the defendant, upon the premises, as part of the family of the defendant and his wife, and that he so resided with them at the time of the death of the stepson's mother, and remained at the house for a short time, not exceeding three weeks, after her decease; and it was held that this circumstance of the true owner coming to the house of his mother and her husband and so being with them was sufficient evidence from which a fresh tenancy should be presumed to have been created between the stepson and the stepfather upon these occasions, although there was no evidence of a word having been passed between them relative to the property or the title to it, or of any express assertion of title by the true owner. That case is very fully commented on in *Keffer v. Keffer*, and is strong in support of the defendant in the case before us.

So in *Doe dem. Stanway v. Rock*, 4 M. & G. 30—where the lords of a manor, the true owners of property, held a rent day and sent a message to Mrs. Woolrich, who claimed title by possession, desiring her to come over and pay rent for the premises, and she sent back word to say that she would come or send over presently, but it was not proved that she either went or paid rent—it was held that upon

this evidence it was properly left to the jury to say whether or not a tenancy at will had thus been created between the Lords of the Manor and Mrs. Woolrich.

So in *Doe dem. Bennett v. Turner*, 9 M. & W. 644, the acts from which the inference drawn by the jury that a new tenancy at will had been created was upheld by the Court are not so strong, it appears to me, as what took place here ; for believing as I do the evidence of the defendant, that in reply to his informing the plaintiff that he had authority from his father to remove him because of his wrongful cutting the timber and neglecting to pay the taxes, the plaintiff undertook not to cut any more timber, and to pay the taxes, and to give up the possession whenever required so to do by his father, I think no other construction can be put upon this conduct than that then a new tenancy at will was agreed to in order to avert the threatened eviction. And that this did take place I see no reason to doubt. The defendant's evidence is, I think, sufficiently confirmed by evidence given by the plaintiff himself, when he admits that the defendant did come up for the purpose stated by him, and that he, the plaintiff, may have told him that he would leave the place whenever required by his father to do so.

This evidence is to my mind stronger than the evidence in *Doe dem. Shepherd v. Bayley*, 10 U. C. R. 310, where it was held that an offer to purchase the premises after an entry was sufficient evidence of a new tenancy at will having been created. After the defendant went up with the authority from his father to remove the plaintiff, as I think the evidence sufficiently shews he did, for the reasons given, and after in pursuance of that authority the defendant did enter upon the land and asserted title thereto as his father's agent, and afterwards had an interview with the plaintiff resulting in his being permitted to continue in possession instead of being removed, the only rational way of accounting for this continued possession, as it appears to me, is that a new tenancy was created upon the plaintiff undertaking to commit no more injury to the property by

taking off the timber, and agreeing to go out whenever required, as the defendant swears is the case.

I think, therefore, upon the authority of the cases collected in *Keffer v. Keffer*, that our judgment should be in favour of the defendant, and that he should retain the verdict rendered in his favor.

The Court being equally divided, the rule drops, and the verdict stands.

March 7, 1879. This case was mentioned, and it was stated that the plaintiff desired to appeal, and the Court were asked to direct for such purposes that the rule should, be discharged.

WILSON, C. J.—Where the Court is equally divided, and the rule in consequence drops, it is held for the purposes of appeal to be discharged, As the matter has been brought to our notice we give a direction to that effect, namely that the rule be discharged, without costs, for the purpose of enabling the plaintiff to appeal.

Rule discharged.

CHURCHILL V. DENHAM ET AL.

Replevin bond—Delay in proceeding—Damages.

In an action for breach of a replevin bond for not prosecuting the replevin suit without delay, the plaintiff at the trial was awarded as damages, the amount of the rent distrained for. On motion in term, on the defendants undertaking to bring the replevin suit down to trial at the next assizes, the damages were reduced to a nominal sum.

THIS was an action on a replevin bond against the defendants, E. C. Denham, John Elliott, and James Smith, the obligees of the said bond.

The declaration alleged the issue of a writ of replevin in the Court of Common Pleas, by the said E. C. Denham against the now plaintiff, for the taking and unjustly detaining her goods and chattels, and the delivery thereof to the sheriff; and that thereupon the defendants, in pursuance of the statute in that behalf, by their bond, bearing date the 5th of March, 1878, became bound to the sheriff in the sum of \$450, to be paid to the said sheriff or his certain attorney, executors, administrators, or assigns, subject to a condition, that if the said defendant E. C. Denham should prosecute her said suit with effect, and without delay, against the now plaintiff for the taking and unjustly detaining her said goods and chattels, and should pay such damages as the said now plaintiff should sustain by the issuing of the said writ of replevin, and be put to, to recover judgment in the said suit, and should make a return of the said property, if a return thereof should be adjudged, then the said bond should be void, or else remain in full force and virtue; and alleged as a breach, that the said E. C. Denham did not prosecute her said suit with effect and without delay against the said now plaintiff, whereby the said bond became forfeited to the said sheriff, who thereupon afterwards assigned the same by deed to the now plaintiff, according to the form of the statute in such case made and provided. And the plaintiff claimed \$450.

Pleas: 1. *Non est factum*. 2. Denying the assignment from the sheriff. 3. That the said E. C. Denham did pro-

secute her said suit in the said condition mentioned, without delay, and the said suit has been and still is depending in the said Court and undetermined. Issue.

The cause was tried before Hagarty, C. J., with a jury, at Toronto, at the Winter Assizes of 1878.

It appeared at the trial that the writ of replevin issued on the 4th March, 1878, and was served on the 6th March, 1878: that an appearance was duly entered and a declaration filed and served, to which an avowry was pleaded, but that issue had not been joined, and that the said replevin suit was still pending at the time of the trial herein.

It was proved that there were two Assizes held after the issue of the writ of replevin, at which the action of replevin might have been taken down at trial; but that the said cause was not taken down to either of said Assizes. The first of such Assizes was held in June, 1878, and the second in September, 1878.

The assignment of the replevin bond from the sheriff to the plaintiff was proved.

It appeared that the amount of the rent distrained for was \$320, and the penalty of the bond was \$450.

This action was commenced on the 12th November, 1878.

At the close of the case the counsel for the defendants objected that only nominal damages could be recovered: that the amount of rent was not the criterion of damages: that under R. S. O. ch. 53, sec. 12, the bond was brought within the statute 8 & 9 Will. III. ch. 11, and that therefore actual damages must be proved and assessed.

The learned Judge found that there had been a breach of the bond in not prosecuting the said action of replevin without delay, and was of opinion that the plaintiff was entitled to recover in debt the amount of the penalty of the bond, and as damages the amount of the rent distrained for; and he accordingly entered a verdict for the plaintiff in debt \$450, and damages \$320.

In this term, February 6, 1879, *J. B. Clarke* obtained a rule *nisi* to reduce the damages assessed at the trial to nominal damages.

During the same term, February 13, 1879, *J. A. Proctor* shewed cause. The damages were properly assessed at the trial. The plaintiff is entitled to recover as damages the amount of the rent distrained for: *Heley v. Cousins*, 34 U. C. R. 63, 74-5; *Ruttan v. Short*, 12 U. C. R. 485; *Johnson v. Parke*, 12 C. P. 179; *Bletcher v. Burn*, 24 U. C. R. 259.

J. B. Clarke, contra. The plaintiff is only entitled to recover nominal damages. Under 39 Vic. ch. 7, sec. 8, O., R. S. O. ch. 53, sec. 12, replevin bonds are made subject to the provisions of 8 & 9 Will. III. ch. 11, sec. 8, and the plaintiff can only recover the actual damages he has sustained. The breach here is not prosecuting without delay, and for this there can only be nominal damages. The right of the plaintiff to recover substantial damages—for example, the value of the goods distrained—must depend on the final determination of the replevin suit, and must arise under the breach for not prosecuting with effect. If the now defendant should succeed in the replevin suit, the now plaintiff will of course have sustained no damages: *Greer v. Johnston*, 40 U. C. R. 116; *Mayne on Damages*, 2nd ed., 353. The cases relied upon by the plaintiff were before the 39 Vic. ch. 7, O., came in force, and were for not prosecuting the replevin suit with effect.

February 13, 1879. WILSON, C. J.—The only breach proved to have occurred is not prosecuting the replevin suit without delay. For such breach only nominal damages should be recovered; and upon the defendant undertaking to bring the replevin suit to trial at the next Assizes, the rule will be absolute to reduce the verdict to nominal damages. There will be no costs of the proceedings in term to either party.

GALT, J., concurred.

The defendant gave the necessary undertaking, and the rule was accordingly made absolute.

Rule absolute.

KELLY V. EARL (a).

Action for the price of liquors—Plea, that the liquors were furnished to be sold without a license—Evidence.

To an action on the common counts for goods sold and delivered, defendant pleaded as to so much of plaintiff's claim as is for intoxicating liquors, &c., that defendant was not the holder of a license authorizing him to sell spirituous and malt liquors, but was accustomed to sell such liquors without license, and the plaintiff well-knowing this, and with the intention of aiding and enabling the defendant to carry on such illegal traffic as aforesaid, sold to the defendant large quantities of spirituous and malt liquors, which are part of the goods for which the plaintiff seeks to recover. The arbitrator to whom it was referred to find the facts of the opinion of the Court, found that while the defendant was accustomed to and did sell such liquors without a license, the plaintiff knowing this sold to the defendant intoxicating liquors, &c., *Held*, that the plea was bad, because by the License Act and other enactments, there was a class of persons, to-wit, druggists, &c., who might sell without license, and the plea did not allege that defendant was not one of such class; and that the finding of the arbitrator did not go as far as the plea, for that it was quite consistent with the finding that the liquor was sold to defendant for his own consumption.

ACTION for goods sold and delivered.

Pleas. Never indebted, and payment.

Issue.

The cause was referred by consent of parties, by order of Robert G. Dalton, Esq., Clerk of the Crown and Pleas in the Queen's Bench, sitting in Chambers, to the award of John Bruce, of the city of Toronto, Barrister, with the following, among other powers—that is to say, the powers of a Judge at Nisi Prius as to certifying for costs and amending proceedings.

By an order made in Chambers by the Honourable John H. Hagarty, then Chief Justice of the Court of Common Pleas, it was ordered that the order of reference should be amended by the addition of a clause, to the effect that the arbitrator should find the special facts, and in his award report the same to the Court in the form of a special case leaving it for the decision of the Court, whether a plea which the arbitrator had allowed the defendant to add was a good defence in law.

(a) The judgments in this and the following two cases were delivered by CAMERON, J., sitting alone, in Hilary Vacation, but to save delay they are published among the term judgments.

The plea was as follows :

And for a third plea, as to so much of the plaintiff's declaration as is for intoxicating liquors furnished after the month of August, 1876, the defendant says that the defendant was not the holder of a license authorizing him to sell spirituous and malt liquors, but was accustomed to sell, and did sell, such liquors without license ; and the plaintiff, well knowing that the defendant was so selling illegally, and with the intention of aiding and enabling the defendant to carry on such illegal traffic as aforesaid, sold to the defendant large quantities of spirituous and malt liquors, which liquors are part of the goods for the price of which the plaintiff seeks to recover in this action.

To this plea the plaintiff demurred, on the following grounds : 1. The plea sets up as a defence a fact not material in law, and would not, if true, prevent a recovery in this action for such goods, namely, the sale of liquors to a person who had no license to sell liquors. 2. The plea puts in issue two facts, that defendant had no license, and a sale by the plaintiff to defendant of the liquor with the intent alleged. 3. The plea puts in issue the fact as to the time of sale, and does not state what part of the goods were legally and what part illegally sold, and the plea neither confesses and avoids, nor denies the plaintiff's cause of action. 4. The plea asserts that the plaintiff sold liquors to the defendant with a certain intent—it does not say the defendant did sell the same ; and *non constat*, but that defendant used the liquors himself in his own house, in which case the sale by the plaintiff would not be illegal.

The arbitrator by his award found “ that subsequent to the month of August, 1876, and while the defendant was not the holder of a license authorising him to sell spirituous and malt liquors, but was accustomed to sell and did sell such liquors without license, the said plaintiff, knowing that the said defendant was accustomed to sell spirituous and malt liquors without license, did sell to the defendant intoxicating liquors to the value of \$224.65, which said amount forms part of the amount sought to be recovered in this

cause. And that if, in the opinion of the Court, the said plea is not in law a good defence, the said defendant is indebted to the plaintiff in the sum of \$350, but if said plea is a good defence, then defendant is indebted to the plaintiff in the sum of \$115.35.

February 12, 1879. *C. Durand*, for the plaintiff. The plea is no answer. It is not illegal to sell spirituous liquors to a person who had no license to sell intoxicating liquors; at all events, unless it were either shewn that they were sold so as to entitle the plaintiff to be paid out of the proceeds of the illegal traffic, or upon an express agreement that they should be used in such illegal traffic. The plea is inartificially framed, and is not an answer to the declaration; nor is any amount averred as to which it would be an answer. It does not shew the defendant sold or disposed of the liquor illegally: *Hodgson v. Temple*, 5 Taunt. 181; *Brown v. Duncan*, 10 B. & C. 93; *Bowry v. Bennet*, 1 Camp. 348.

Winchester, for the defendant. The plea is good. It avers more than is necessary, as it is sufficient to shew that the plaintiff had knowledge that the defendant had no license, and was unauthorized to sell spirituous liquors without such license, and it need not be shewn in support of the plea that the plaintiff was either to be paid out of the proceeds of the illegal sales, or sold the goods with the express intent that defendant should sell them without license. He referred to *Benjamin* on Sales, 2nd ed., 467; *Pearce v. Brooks*, L. R. 1 Ex. 213; *Ritchie v. Smith*, 6 C. B. 462; *Langton v. Hughes*, 1 M. & S. 592; *Canan v. Bryce*, 3 B. & Al. 179. On the authority of these cases the award finds enough to confine the plaintiff's recovery to the smaller sum found by the arbitrator.

February 21, 1879. CAMERON, J.—The first question is, does the plea disclose sufficient to make it a good defence; and second, if so, has the arbitrator found the facts sufficiently to sustain the truth of the plea.

By sec. 39 of R. S. O. ch. 181, "No person shall sell by wholesale or retail any spirituous, fermented, or other manufactured liquors, without having first obtained a license under this Act authorizing him so to do ; but this section shall not apply to sales under legal process, or for distress, or sales by assignees in insolvency."

Sec. 51 provides: "Any person who sells or barter spirituous, fermented, or manufactured liquors of any kind, or intoxicating liquors of any kind, without the license therefor by law required, * * shall for the first offence, on conviction thereof, forfeit and pay a penalty of not less than twenty dollars, besides costs, and not more than fifty dollars besides costs ; and for the second offence, on conviction thereof, such person shall be imprisoned in the county jail of the county in which the offence was committed, to be kept to hard labour for a period not exceeding three months."

By sec. 42 it is provided that sec. 39 "Shall not prevent any chemist or druggist, duly registered as such under and by virtue of 'The Pharmacy Act,' from * * selling liquors for strictly medicinal purposes, and then only in packages of not more than twelve ounces at any one time, except under certificate from a registered medical practitioner."

By sec. 104 it is enacted: "Nothing in the foregoing provisions of this Act shall be construed to affect or impair any of the provisions of 'The Temperance Act of 1864' of the late Province of Canada, or 'The Temperance Act of Ontario ;' and no tavern or shop license shall be issued or take effect within any county, city, town, incorporated village, or township in Ontario within which any by-law for prohibiting the sale of liquor under the said Acts is in force."

Sec. 108 declares: "The sale of liquor without license in any municipality where 'The Temperance Act of 1864,' and 'The Temperance Act of Ontario' are in force shall nevertheless be a contravention of section 39 * * and the several provisions of this Act shall have full force and effect

in every such municipality, except in so far as such provisions relate to granting licenses for the sale of liquors by retail."

By sec. 1 of the Temperance Act of 1864, and section 3 of the Temperance Act of Ontario, R. S. O. ch. 182, "The municipal council of every county, city, town, township, or incorporated village, * * shall have power at any time to pass a by-law for prohibiting the sale of intoxicating liquors and the issue of licenses therefor within such county, city, town, township, or incorporated village under authority and for enforcement of this Act, and subject to the provisions and limitations hereby enacted."

By sec. 11, sub-sec. 1 and section 12 of the Temperance Act of 1864, and section 13 of the Temperance Act of Ontario, it is declared "From the day on which any by-law passed under authority and for enforcement of this Act takes effect, and so long thereafter as the same continues in force, (a) "No license shall be issued to take effect within the county, city, town, township, or incorporated village affected by such by-law ;" and (b) "No person, unless it be for exclusively medicinal or sacramental purposes, or for *bona fide* use in some art, trade, or manufacture, * * shall * * sell, or barter, or in consideration of the purchase of any other property give to any other person any spirituous or other intoxicating liquor."

From these enactments it appears where the Temperance Act is not in force, a chemist or druggist may sell without license for medicinal purposes under certain restrictions and any person, where the Temperance Act is in force, may sell for the special purposes indicated, that is to say, for medicinal or sacramental purposes, or to be *bona fide* used in some art, trade, or manufacture.

And by sub-sec. 4 of sec. 12 of the Temperance Act of 1864, "Any merchant or trader having his store or place for sale of goods within such county, city, town, township, parish, or incorporated village, may thereat keep for sale and sell intoxicating liquor, but only in quantities not less than five gallons," &c. And as there are persons who may sell and

purposes for which liquors may be sold without a license being held by the seller, the plea should aver that the defendant was not a chemist or druggist: that in the municipality where he sold no by-law had been passed prohibiting the sale of intoxicating liquor, or if such a by-law had been passed, that he sold by wholesale and without the license so to do required by law. The plea merely avers that the defendant was not the holder of a license authorizing him to sell spirituous and malt liquors, but was accustomed to sell, and did sell, such liquors without license, and the plaintiff well knowing that the defendant was so selling liquor illegally, and with the intention of aiding and enabling the defendant to carry on such illegal traffic, sold to him large quantities of spirituous and malt liquors, which liquors are part of the goods for the price of which the plaintiff seeks to recover.

Now if the defendant were a chemist or druggist, it would be quite lawful for him to sell spirituous and malt liquors for medicinal purposes, and the plaintiff might very properly sell to him, knowing that he sold such spirituous and malt liquors. This plea would then be established by simply proving a sale by defendant, although he was a druggist, and although the liquor was sold in the way of his business for medicinal purposes. It is the defendant who seeks to avoid a liability, and he has within himself the knowledge which would enable him to make the necessary averments to establish the illegality of his own act, through which he seeks to do an individual who has confided in him an injustice; and which the law will only assist him in doing on the ground that public policy requires it. He must, however, shew that he has brought himself by proper averments in his plea within the principle which prevents a recovery for goods sold for an unlawful and prohibited purpose. There is nothing against public policy or morals in the mere act of selling spirituous liquors; and the Legislature of Ontario had power to require a license to be taken out for the purpose of revenue only; and as some persons may sell without taking out a license, it appears to me

incumbent on the defendant to shew that he is not of that class of persons who may so sell, before it can appear that the plaintiff in aiding him to sell has been doing an immoral act against public policy.

The arbitrator in his finding does not go as far as the plea, as he does not find that the plaintiff sold the liquors to the defendant for the purpose of aiding him in violating the law, or that he sold them to be sold again by the defendant. It is quite consistent with his finding that the liquors may have been sold to defendant to be consumed by himself or family. He simply finds that subsequent to the month of August, 1876, while the defendant was not the holder of a license authorizing him to sell spirituous and malt liquors, but was accustomed to sell, and did sell such liquors without license, the plaintiff, knowing this, sold to the defendant intoxicating liquors to the amount of \$224.65.

Now it is quite consistent with this finding, that the liquors were required for a different purpose than that of sale. And they might have been of a totally different character from those which the defendant was making traffic of. If he had found the plea to be true he would have found that the plaintiff sold the liquors to the defendant with the intention of aiding and enabling the defendant to carry on an illegal traffic; and if the plea is not bad on the ground I have pointed out, this would entitle the defendant to succeed in keeping the award at the lesser amount.

But the finding in its present shape does not sustain—that is, does not go as far as—the plea in its present shape.

On the merits there is a conflict of authority as to whether an intention on the part of the seller that the goods sold shall be used for an unlawful purpose, is necessary to prevent the recovery of the price.

In some cases there is a distinction made between a purpose bad in itself, or *malum in se*, and a thing prohibited, *malum prohibitum*.

The most recent case I have seen is *Pearce v. Brooks*, L. R. 1 Ex. 213, cited by Mr. Winchester

Chief Baron Pollock there lays it down that no such distinction exists.

In that case, the plaintiffs, who were coach builders, sued the defendant, a prostitute, on an agreement for the hire of a brougham. The defendant pleaded, that at the time of making the supposed agreement the defendant was to the knowledge of the plaintiffs a prostitute: that the agreement was made for the supply of a brougham to be used by her as such prostitute, and to assist her in carrying on her said immoral vocation, as the plaintiffs when they made the agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs out of her receipts as such prostitute. Issue was joined on this plea. It appeared at the trial that plaintiffs were coach builders, and there was evidence to satisfy the jury that one of the plaintiffs knew the defendant was a prostitute. There was no direct evidence that either of the plaintiffs knew that the brougham was intended to be used for the purpose of enabling the defendant to prosecute her trade of prostitution, and there was no evidence that the plaintiffs expected to be paid out of the wages of prostitution. The Judge, Baron Bramwell, left the following questions to the jury: 1. Did the defendant hire the brougham for the purpose of her prostitution? 2. If she did, did the plaintiffs know the purpose for which it was hired? The jury found that the carriage was used by the defendant as part of her display to attract men; and that the plaintiffs knew it was supplied to be used for that purpose. On this finding the learned Judge entered a verdict for defendant, with leave to the plaintiffs to move to enter a verdict for the amount claimed. The plaintiffs moved accordingly, and after argument the rule was discharged.

Pollock, C. B., in giving judgment, said, at p. 217: "Since the case of *Cannan v. Bryce*, 3 B. & Al. 179, * * I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so

supplied. If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act * * that proposition has been overruled by the cases I have referred to, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose. * * If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain. * * If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiffs' knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient."

Martin, B. said, at p. 219: "In my opinion the plea is good if the third averment be struck out," namely, that plaintiffs expected to be paid out of defendant's prostitution; "and if, therefore, there is evidence that the brougham was to the knowledge of the plaintiffs hired for the purpose of such display as would assist the defendant in her immoral occupation, the substance of the plea is proved, and the contract was illegal. * * As to the case of *Cannan v. Bryce*, 3 B. & Al. 179, I have a strong impression it has been questioned to this extent, that if money is lent, the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it will be employed illegally, he will not be disentitled from recovering. But no doubt, if it were part of the contract that the money should be so applied, the contract would be illegal."

Pollock, Chief Baron, added: "I entirely agree with what has fallen from my brother Martin, as to the case of *Cannan v. Bryce*. If a person lends money, but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied, * * The case cited rests on the fact that the money was borrowed with the very object of satisfying an illegal purpose."

In *Hodgson v. Temple*, 5 Taunt. 181, the plaintiffs, distillers, proved they had delivered large quantities of spirits to the defendant under permits authorizing the delivery to Richard Temple as buyer, and for his use, at a rectifying distillery, which was entered with the excise officer as the distillery of Richard Temple; but it was in fact the property, and carried on for the benefit of the defendant. The defendant also kept a licensed retail shop for the sale of spirituous liquors, which the plaintiff distinctly knew. After verdict for the plaintiff it was moved against on the ground that by the statute 26 Geo. III., ch. 73, sec. 54, no person licensed to sell brandy or other spirits by retail, shall be proprietor or owner of any distillery or rectifying house, or have any part or share in any distillery or rectifying house, or be in any manner concerned in the traffic or business of a distiller, rectifier, or compounder of spirits, under a penalty of £200 for the offence.

Lord Mansfield, C. J., said, at p. 182: "The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment, but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction."

Heath, J., said: "Cases have been decided upon this distinction, as where a smuggler, in time of peace, bought brandy in France, and brought it over here, and sold it, it was held that the vendor might recover; * * but where a smuggler bought brandy in Guernsey, and the vendor packed it in ankers, in preparation for smuggling, he could not recover the price of it, because he was aiding in the breach of our revenue laws."

In some of the cases there is a clear distinction drawn, where a thing is prohibited for revenue purposes merely, and where the prohibition is for the protection of buyers and consumers, or for some other object of public policy.

In *Ritchie v. Smith*, 6 C. B. 462, where the bargain between the parties was to enable the buyer to carry on a retail trade in spirits on part of the vendor's premises under the vendor's license, so as to make one license cover

both trades, contrary to the statute 9 Geo. IV. ch. 61, which inflicted a penalty when liquor was sold to be drunk on the premises without license, Wilde, C. J., said, at p. 475: "It is impossible to look at this agreement without seeing that the parties contemplated the doing an illegal thing, in the infraction of a law enacted, not simply for revenue purposes, but for the safety and protection of the public morals."

The License Act of Ontario and this Act may be considered in *pari materia*, unless the provision in the British North America Act, sec. 92, sub-sec. 9, restricts it to revenue purposes only.

This provision is, "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: * * 9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes." Much may be said on this head; but as I do not base my judgment upon it, I will not now further discuss it.

The finding of the arbitrator does not bring the case within either of these cases. It does not shew that the plaintiff sold the liquors for the purpose of the defendant's retailing or selling them in defiance of the license law; and I think, therefore, both on the ground of the insufficiency of the plea, and the finding of the arbitrator not going far enough to shew that the plaintiff was a sharer in the alleged illegal sale of liquors by the defendant, the plaintiff is entitled to recover the full amount of the award, \$350.

The case is only before me on the demurrer and award, and if I have the power I should not be disposed to use it to bring the evidence before the Court to see whether the finding of the arbitrator might not be enlarged by force of that evidence, so as to bring the case within those cited.

I do not think Lord Mansfield meant, by the use of the expression, the vendor should be a sharer in the illegal transaction, that he should participate in the profits, but merely that he should do something more than sell the goods with a knowledge that the buyer will apply them to

the illegal purpose. He must do something to encourage or aid in the illegal proceeding. The having knowledge of the buyer's intention does not make the goods sold assist in the transaction more than would goods bought from one ignorant of the intention.

Judgment for plaintiff.

REYNOLDS V. THE CORPORATION OF THE COUNTY OF
ONTARIO.

County Board of auditors—Audit of—Conclusiveness of—Pleading.

To an action for the recovery of fees for services connected with the administration of justice within defendants' county, claimed to have been rendered by the plaintiff as sheriff, alleging that such fees had been duly audited by the county board of auditors under the statute, whereby plaintiff became entitled to receive payment of the same, the defendants pleaded on equitable grounds, setting up that the right to such fees had been disputed, and submitted to this Court by a special case, and that the alleged audit was made under a misconception of the judgment which the auditors erroneously understood to decide that the plaintiff was entitled to such fees, whereas the decision was to the contrary.

Held, plea good, for that such audit was not conclusive, but that the circumstance under which it was made might be shewn.

THE plaintiff in his declaration alleged, that he rendered divers services connected with the administration of justice within the County of Ontario, as sheriff, and his account for fees for such services was duly rendered to the proper officer, and was duly audited and allowed by the auditors composing the board of audit for the county, in accordance with the statute in that behalf, at the sum of \$5,654.88; and thereupon the plaintiff became entitled to receive and be paid the said sum out of the funds of the county in preference to all other charges, under the statute in that

behalf, and duly demanded payment thereof from the defendants and their treasurer, who have neglected and refused to pay the same.

Fourth plea: On equitable grounds, in substance, that the plaintiff's claim is for certain fees for summoning grand and petit jurors for the county, from the year 1856 to the year 1868, which fees the defendants allege are not legally payable, and they instructed the board of audit not to allow the same, and the said board of audit refused to allow the same when the claim was presented by the plaintiff: that the plaintiff, in order to test his right to the fees so claimed, applied to the Court for a mandamus to compel the auditors to audit and allow the said claim, and that upon the return of the rule *nisi*, by the agreement of the parties, a special case was submitted for the opinion of the Court of Queen's Bench, and upon the said case the said Court gave judgment to the effect that the plaintiff was not entitled to the fees claimed in this suit; that thereupon the plaintiff applied to the auditors, presenting them with a copy of the judgment of the Court, and representing that the judgment was in the plaintiff's favour, and the auditors, accepting this view of the judgment, allowed the plaintiff's claim without in effect exercising their own judgment thereon.

To this plea the plaintiff demurred, on the grounds that it disclosed no defence; that the audit when made being conclusive under the statute, the motives or reasons which caused the auditors to audit and allow the plaintiff's claim cannot be inquired into, or their decision be reversed.

February 11, 1879. *Hector Cameron*, Q. C., for the demurrer. The functions of the auditors are *quasi judicial*, and the Court cannot reverse their decision: If there has been a mistake, it was a mistake in law not of fact, and neither equity nor law will relieve against a mistake in law.

Robinson, Q. C., and *H. J. Scott*, contra. The plea is a denial of any liability on the part of the defendants. The

audit was not final when the auditors dealt with matters that were not within their province; and they could not allow fees not sanctioned by law. The judgment of the Queen's Bench shews the fees were not allowable, and the arbitrators not having acted on their own judgment, but erroneously in supposed deference to the judgment of the Queen's Bench, the audit is not conclusive, but the claim is in the same position as if the audit had not been made. The plea shews the claim was for fees extending over a period of twelve years, and the audit ought to have taken place annually, and the claim cannot now be enforced irrespective of the Statute of Limitations, which was not invoked: *Corporation of Frontenac v. Corporation of Kingston*, 20 C. P. 491, 30 U. C. R. 584.

February 21, 1879. CAMERON, J.—The question as to whether the plaintiff was by law entitled to the fees claimed for the services performed between the years 1856 and 1868, was not argued, and the judgment of the Court is asked simply on the point, whether it is now open to the defendants upon the facts alleged in the plea to question the right of the plaintiff to recover.

I think it is so open to the defendants, and that the plea is good. If the allegations in the plea are true, and on demurrer they must be taken to be true, then there was no audit—that is, no exercise of the judgment of the auditors upon the claims submitted—but a decision by them, as it is averred, against the very judgment they wished to follow, was given.

The rule that a mistake in law will not relieve where a mistake in fact will, has no application in this case, the mistake not being the mistake of one of the interested parties.

The audit of the auditors moreover is not now, whatever it may have been previous to the year 1868, in all cases conclusive, as by sec. 10 of R. S. O. ch. 85, it is expressly provided, that the county treasurer shall furnish the board of audit with a copy of the items disallowed by the Provin-

cial Treasurer in the criminal justice accounts of the previous quarter, and the board shall have power in their discretion to deduct the amounts so disallowed from the next or any accounts of the same officers submitted for audit. The audit then, though the funds are ultimately to come from the consolidated revenue of the province, is not binding upon the Provincial Treasurer, and it would seem unjust to hold that the body which for public convenience is made immediately liable should not have a right to question the validity of an audit performed in the manner this plea sets up.

There should therefore be judgment for the defendants on the demurrer to the fourth plea.

Judgment for defendants.

THE ONTARIO COPPER LIGHTNING ROD COMPANY V.
HEWITT.

*Action for deceit—Inducing plaintiffs by fraud to accept composition—
Pleading.*

A declaration alleged that the defendant was indebted to the plaintiffs in a large sum of money, to wit, &c., besides the costs of a suit to recover same; and that defendant fraudulently represented to plaintiffs that he was insolvent and unable to pay said indebtedness in full, and thereby induced plaintiffs to take a composition in respect of said debt and costs, whereas defendant was not insolvent, &c., whereby plaintiffs lost the difference, &c., and were put to costs in arranging the composition.

Held, that it was no objection to the declaration that it did not aver that defendant knew that he was not insolvent, because it charged the representation to be fraudulent; but that the declaration was bad because no damage was shewn; for if the plaintiffs were induced to take a less sum through defendant's fraud the original cause of action still existed, and the plaintiffs could proceed with their former action.

DECLARATION: That the defendant was indebted to the plaintiffs in a large sum of money, to wit, the sum of \$2,800, besides the costs of a suit brought to recover the

same, and the defendant fraudulently represented to the plaintiffs that he was insolvent, and unable by reason of the insufficiency of his assets to pay the said indebtedness in full, and the defendant, by so representing as aforesaid, induced the plaintiffs to take a composition upon the amount of their said debt against the defendant, to wit, to accept the sum of \$2,420 in full for the said sum of \$2,800, and costs, so due and owing by the defendant as aforesaid, whereas the said defendant was not then insolvent, and was not unable by reason of the insufficiency of his assets to pay the said indebtedness; whereby the plaintiffs lost the difference between the said sums, and the costs of the said suit brought to recover the same, and were put to costs in arranging the said composition. And the plaintiffs claim six hundred dollars.

To this declaration, the defendant demurred on the grounds: 1. The declaration discloses no cause of action by the plaintiffs against the defendant. 2. The alleged representations are not actionable. 3. It is not averred that the alleged representations were false, or that the defendant knew them to be false.

February 18, 1879. *Osler*, Q. C., for the plaintiffs, referred to *Young v. Vickers*, 32 U. C. R. 385; *Richardson v. Silvester*, L. R. 9 Q. B. 34; *Bullen & Leake*, 2nd ed., 289-90.

T. H. Spencer, contra, cited *Budd v. Fairmaner*, 8 Bing. 48, 52; *Williamson v. Allison*, 2 East 446; *Foster v. Green*, 7 H. & N. 881; *Atkinson v. Denby*, 7 H. & N. 934; *Ex parte Morrison*, 12 W. R. 1093; *Archbold on Bankruptcy*, 1054; *Corbett v. Brown*, 8 Bing. 3; *Chandelor v. Lopus*, 1 Sm. L. C., 7th ed., 173; *Pasley v. Freeman*, 2 Sm. L. C., 7th ed., 64; *Collins v. Evans*, 5 Q. B. 820; *Cornfoot v. Fowke*, 6 M. & W. 358.

March 4, 1879. CAMERON, J.—I think the declaration is not defective by reason of there being no averment that the defendant knew he was not insolvent, as it charges

the representation was fraudulent; and, according to *Young v. Vickers*, 32 U. C. R. 385, where the question is very fully discussed, and a number of authorities considered, this allegation of fraud would put the plaintiff to the necessity of proving all that the law requires to constitute actionable fraud.

But the vice in the declaration is, that it does not shew any damage to the plaintiff; for if it is true, as alleged, that the plaintiffs were induced to take a less sum than they claimed through the defendant's fraud, the original cause of action still exists, and from all that is shewn in the declaration, the plaintiffs are at liberty to proceed with the former action.

If defendant were to plead to a declaration on the common counts, as this declaration alleges, that he paid a less sum than the plaintiffs' demand, which the plaintiffs accepted in full, without more, the plea would be bad.

It was admitted by Mr. Osler on the argument that no precedent for an action of this kind could be found, and it rested entirely upon the principle that where damage results to one person from the false representations of another, intended by him to be acted on, an action lies at the suit of the injured person.

But, for the reason above stated, the element—the essential element—of damage is wanting in this case, so far as the declaration discloses.

Judgment for defendant.

McGUGAN v. THE MANUFACTURERS AND MERCHANTS'
MUTUAL FIRE INSURANCE COMPANY.

*Insurance—Incumbrance—Misrepresentation—Assessment—Non-payment of
—Effect of note given for—36 Vic. ch. 44, sec. 44, O.*

In an application, dated 1st March, 1876, for insurance in a mutual company for \$500 on a saw mill, in answer to the question: "Incumbrances. Is the property mortgaged? If so, state the amount. Is there any insurance by the mortgagee?" the applicant answered, "Yes, \$500 mortgage. In case of loss payable to McG. as interest may appear," without mentioning another mortgage for \$1000 on the property. This application was one of three applications made at the same time, and forming one transaction, and though each was on different buildings all were on the same piece of land, $4\frac{3}{4}$ acres. In one of such other applications, in answer to the question, "What incumbrance, if any, is now on said property?" the answer was, "\$1,500 mortgage on this and saw mill property, all insured in this company; 1st of March application takes effect on saw mill."

Held, under these circumstances, there was no misrepresentation as to incumbrances, and that the company had notice in writing of the truth with regard to them, by means of the two applications, which referred to each other.

For an assessment made on the premium note, the insured, at the request of the company's secretary, gave a note at two months, signed by himself and one L., which the secretary stated would be accepted as payment, and in the company's register the assessment was entered as paid by this note. The note was not paid at maturity, in consequence of which the company refused to pay the loss:

Held, that under sec. 44 of the Mutual Insurance Companies Act, 36 Vic. ch. 44, O., the note could only be deemed as suspending the debt during its currency, and therefore its non-payment at maturity avoided the insurance.

Action on fire policy, granted to Daniel McLaren, dated the 13th of March, 1876, for three years, ending on the 1st of March, 1879, for the sum of \$500, namely, \$100 on a saw, planing, and shingle mill, and \$400 on fixed and movable machinery contained in the said building, situated on the west of Furnival road, in the township of Aldborough. The loss, if any, was payable to the plaintiff as his interest might appear, and averring an interest in him severally in the premises to the amount insured.

The pleadings were very lengthy.

The only questions which were argued were that the policy was void, because the plaintiff had not truly represented the amount of the incumbrances upon the property,

and because he had not paid the assessment upon his premium note within thirty days after the assessment.

The plaintiff replied, upon equitable grounds, to the alleged misrepresentation as to the incumbrances.

The second replication, on equitable grounds, alleged that McLaren made to the defendants' agent verbally a full and honest disclosure of all matters relating to the property in question, and of the title thereto, and incumbrances thereon; and he made no erroneous representations, nor did he omit to make known any fact relating to said incumbrances or any of them: that at the time of the application the insured property and the land upon which it was situated were incumbered to the extent of \$1,500, and no more; that is, \$1,000 upon Cunningham's mortgage, and \$500 upon Munro's mortgage, which was assigned to the plaintiff; and all such facts were stated by McLaren to the agent, who thereupon as agent for the defendants filled up the application, and represented to McLaren that he, the agent, had filled it up correctly; and McLaren trusting to such representation signed the application at the agent's request, believing it to be correct.

The third replication, on equitable grounds, stated that notice in writing of the said incumbrance was given by McLaren to the defendants, who thereupon with full knowledge of the facts executed and issued to McLaren the policy of insurance sued upon.

The defendants rejoined to the second replication that by the application for policy which McLaren signed it was agreed that if the agent of the defendants filled up the application he would in that case be the agent of the applicant, and not of the defendants; and that the policy was issued solely upon the representations contained in the application.

The cause was tried before Patterson, J. A., without a jury, at St. Thomas, at the Fall Assizes of 1878.

The facts were nearly all admitted. McLaren, the applicant, was the only witness examined.

The facts, shortly stated, were as follows:—

On the 24th of February, 1876, Mr. Jarvis, the agent of the defendants, called upon McLaren to get him to insure with the defendants. The agent filled up three separate applications for insurances on different properties, but all situate upon the same piece of land, containing $4\frac{3}{4}$ acres of land, in the township of Aldborough. They were all filled up and completed on the same day.

The first application was numbered 337, and was for \$500. It was the policy now sued upon, and was upon the saw-mill property. The application bore date the 1st of March, because it was not intended to use the mill till that day.

The second application was numbered 338, and was for \$650, namely: \$400 on dwelling house; \$50 on a small building; \$200 on household furniture.

The third application was numbered 339, and was for \$375, namely: \$75 on a small dwelling house; \$50 on another small dwelling house; \$100 on barn and shed; \$150 on ordinary contents of barn and shed.

In the first application, or number 337, the question as to incumbrances was as follows:—

“Incumbrances. Is the property mortgaged? If so, state the amount? Is there any insurance by the mortgagee?” Answer. “Yes, \$500 mortgage. In case of loss made payable to Donald McGugan, as interest may appear.” And the policy upon it was filled up to correspond with the application.

In application number 338 the question was: “Incumbrances. What incumbrance, if any, is now on said property?” Answer. “\$1,500 mortgage on this and saw mill property, all insured in this company; first of March, application takes effect on saw mill.” The policy stated the incumbrances at \$1,500.

In application number 339 the question was: “Incumbrances. What incumbrance, if any, is now on said property?” Answer: “\$1,500 mortgage on this and other property.” The policy stated the incumbrance at \$1,500.

The fire was on the 1st of June, 1877.

On the 20th of January, 1877, the company made an assessment on the premium notes as follows :

In respect of	337.....	\$28 00
"	338.....	13 00
"	339.....	1 56
		<hr/>
		\$42 56

Of which McLaren was duly notified. McLaren sent a note for the amount to the company, which was refused.

The secretary wrote to McLaren, on the 24th of February, 1877, that they had received McLaren's note of the 19th inst., "enclosing a note tendered in payment of your assessment. We cannot accept a note for any longer period than two months. Kindly sign with Mr. Lusty the enclosed note, and we will accept it as payment of assessments on your policies, 337, 338, and 339"

"P. S.—I also enclose your old note."

McLaren and Lusty joined in a note for \$43.26, at two months from 19th of February, 1877.

The note was not paid at maturity, and the company wrote more than once to the two parties in April and May pressing for payment.

On the 4th of June McLaren wrote to the company, informing them of the loss by fire of the saw mill property.

On the 12th of June the company wrote to McLaren that the assessment had not been paid, which was due on the 1st of March, "in consequence of which the company is not liable for any loss."

McLaren answered on the 16th of June, that as to "the assessment due on the 1st of March last and still unpaid," the company would find they had taken "a cash note, \$43.26, signed by myself and N. S. Lusty, and accepted by you as cash payment on policies No. 337, 338, 339, as your letter of February 24th, 1877, will shew."

The assessment in question was entered on the defendants' register as paid by the note which McLaren and Lusty gave.

The learned Judge expressed himself as to the alleged misrepresentation as to the incumbrances as follows :

“ It seems not unlikely that the answer was meant to convey, ‘ This is an insurance for the benefit of McGugan, who has a mortgage of \$500.’ There is no question that the answer, though incomplete and not directly responsive to the question, was honestly made, and that the omission to mention the other incumbrance of \$1,000, was in no sense fraudulent. I do not think that on a fair construction of all the facts and circumstances, and assuming that the officers of the company, whose duty it was to pronounce upon the application and issue or refuse the policies, brought to the discharge of their duties a fair amount of intelligence and attention, this policy can be held void. There clearly was no concealment from the defendants, for in the other applications, which were part of the one transaction with the agent, and as the consecutive numbers of the policies and their identical dates indicate, they were disposed of as one transaction at the chief office.

“ There was not, in my judgment, an erroneous representation. The answer about the \$500 was undoubtedly incomplete as a full statement of the incumbrances, but the shape of the answer was so distinctly calculated to convey the idea that the applicant was speaking only of the claim of McGugan’s interest as mortgagee, and that the question was one to be answered only with reference to that interest, that the manager of the defendants when he read it would, if he gave intelligent attention to what he read, have perceived that that was its character, and that there was neither a representation that no incumbrance existed, nor one which should be treated, without asking for further explanation, as a statement that no incumbrance existed beyond the one held by McGugan.

“ I think it not unfair to assume that the answer was so regarded that further explanation was required, and that it was found in the answer to No. 338, which the manager had before him at the moment.

“ I do not think the applicant can be said to have omit-

ted to make known the fact of the existence of the \$1,000 mortgage, and I have no evidence before me to shew that such omission would have been material to the risk.

"I treat these applications as if made by the applicant himself."

As to the question of the non-payment of the assessment, the learned Judge said :

"The contention now is, that the debt was only suspended while the note was current, and that under section 44 of the Statute the plaintiff is debarred from recovering. I am inclined to think the defendants' contention well founded, though I am not without doubt. I think that, having regard to the nature of mutual insurance and the burden thrown upon others to make good the default of those who do not pay, and to the consideration that the word *payment* does not necessarily import, as used in the secretary's letter or in the register, more than the substitution for the two months of the joint and several liability of the assured and his surety for the liability which rested only on the premium undertaking. While the statute requires that to enjoy the protection of the policy the cash must be paid when called for, the plaintiff cannot insist that these assessments have been paid. It may be that the test would be, could the assured, if sued on his undertaking for these assessments, support a plea of payment by proving the acceptance of the note which has not been paid : *Bottomley v. Nuttall*, 5 C. B. N. S. 122.

"I shall not defer my decision for the purpose of more closely considering that question, but shall enter a verdict for the defendants, and leave the plaintiff the onus of establishing the payment, if he can do so.

"If entitled to recover, the damages will be the full amount of the policy and interest."

In Michaelmas term, November '19, 1878, *Colin McDougall* obtained a rule *nisi* to set aside the verdict entered for the defendants, and to enter a verdict for the plaintiff, pursuant to the leave reserved.

In this term, February 8, 1879, *Ferguson*, Q. C., shewed cause. It is true the applicant stated all the facts relating to the incumbrances, if all the three applications are to be considered as being made in or upon each separate case for insurance. But the company could not be required in reading the application to look at the others also to see whether they affected one another, and, if so, to what extent. The object of taking separate application papers was, that each application should be complete in itself. If that be the correct rule, then the defendants are entitled to succeed upon that part of the case, as it is admitted the application, No. 337, now in question, does not correctly state the incumbrances, which were \$1,500, by representing there was only one incumbrance of \$500. The replications were not proved. The policy is to be judged of by the 36 Vic. ch. 44, secs. 36, 44, O., the law as it was before the Revised Statutes of Ontario. On this part of the case he referred to *Muma v. Niagara District Mutual Ins. Co.*, 22 U. C. R. 214; *Shannon v. Gore District Mutual Ins. Co.*, 37 U. C. R. 380. As to the argument that the promissory note of McLaren and Lusty was taken in payment of the assessments, and so the assessment was not in arrear at the time of the fire, the giving of the note by the insured and another is not necessarily a payment of the assessment upon the premium note, even although it was expressed to be received in payment. The facts of the case must be considered. The company may have suspended the right to forfeit the policy while the note was running, but they never could have intended to abandon their right to suspend the operation of the policy as a protection to the insured, according to the statute, when the note became due and was unpaid. *Carruthers v. Ardagh*, 20 Grant 579, is a very strong case in favour of the defendants. *Jones v. Cameron*, 16 C. P. 271, shews a creditor may hold his original claim, although he has taken a note for it. The case of *Port Darlington Harbour Co. v. Squair*, 18 U. C. R. 533, shews that in the case of a note received as

payment, the question whether it was received in satisfaction or not, should have been left to the jury. *Belshaw v. Bush*, 11 C. B. 191, shews that a promissory note given by a third person to the creditor, is a conditional payment of the original cause of action against the original debtor during the currency of the note, or while it is in the hands of another person as lawful holder of the note. *Bottomley v. Nuttall*, 5 C. B. N. S. 122, is to the same effect. See, also, *Tarleton v. Allhusen*, 2 A. & E. 32; *Hoar v. Clute*, 15 Johnson 224; *Woodcock v. Bennet*, 1 Cowen 711; *Cole v. Sackett*, 1 Hill 516; *Drake v. Mitchell*, 3 East 251; *Byles on Bills*, 12th ed., 383-4.

Coyne, (of St. Thomas,) contra. As to the first point, the insurer told the defendants' agent the whole circumstances truly, and they are all contained in the applications which were taken at the same time and by the same agent, and for the same company, and which should therefore be read together, as they formed the one transaction, because they referred to different parts of the same property: *Chatillon v. Canadian Mutual Ins. Co.*, 27 C. P. 450; *Kerr v. Hastings Mutual Ins. Co.*, 41 U. C. R. 217; *Dear v. Western Ass. Co.*, 41 U. C. R. 553; *Redford v. Mutual Ins. Co. of Clinton*, 38 U. C. R. 538; *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282. The 36 Vic. ch. 44, O., was the statute under which the applications were made and policies issued. And section 36 of that Act must be read in this case without the proviso, as the proviso was repealed by the 39 Vic. ch. 7, O., schedule A, page 35, on the 10th of February, 1876, several days before the applications were signed. As to the second point. The promissory note of the insured and his surety was taken as payment of the assessment, and was so entered in the defendants' books. The company could certainly have taken this note as a waiver of the forfeiture of the policy for non-payment of the assessment under 29 Vic. ch. 37, sec. 5, but that section has not been continued in the 36 Vic. ch. 44, sec. 44, O.

March 7, 1879. WILSON, C. J.—The alleged misrepresentation is, that in application number 337, dated the 1st of March, 1876, to the questions under head 32, “Is the property mortgaged? If so, state the amount? Is there any insurance by the mortgagee?” the applicant gave the answer “Yes, \$500 mortgage. In case of loss, made payable to Donald McGugan, as interest may appear,”

Yes, means the the property is mortgaged; *\$500 mortgage*, states the amount of the mortgage. The residue of the answer was probably intended as a declaration that Donald McGugan was the mortgagee, and he was insured by the loss in question being made payable to him. At that time there was another mortgage upon this particular property, and also upon other property, to one Cunningham, upon which \$1,000 was payable, so that if no more had appeared than the application number 337, we should have been obliged to hold there had been a misrepresentation sufficient to avoid the policy. The plaintiff, who sues for the loss as the payee of the policy money, has replied that “notice in writing of the amount of the said incumbrances,” (\$1,000 and \$500, as before stated), “was given by the said McLaren to the defendants, who thereupon, with full knowledge of the facts relating to the said incumbrances, executed and issued to the said McLaren the policy of insurance sued upon in this action.”

The way that allegation is said to be proved is by the statement given to the question as to incumbrances in application No. 338, filled up by the same agent of the defendants, for an insurance upon another parcel of the same lot, to which applications 337 and 339 refer, with the defendants’ company. The question referred to is:—

“What incumbrance, if any, is now on said property?” The answer is, “\$1,500 mortgage on this and saw mill property, all insured in this company; first of March application takes effect on saw mill.”

Here, then, is a declaration that there is a charge by mortgage upon the property mentioned in application 338, and upon *the saw mill property*, which is the property in

question in this cause, and covered by application 337. It is also declared that both properties are *insured in this company*; and to express that more directly it is added, *the first of March application takes effect on saw mill."*

Now the first of March application is the one which does take effect upon the saw mill, and upon that saw mill the defendants are here expressly told that there is a mortgage charge upon it to the extent of \$1,500, which is the whole truth, although it is said in the saw mill application that McGugan has a mortgage on it for \$500, which is true so far as it goes, but it is not the whole truth.

It is impossible to say the applicant misrepresented the extent of the incumbrances on the said property when he made the two statements in these applications 337 and 338; and it is impossible to say that the company did not know by these two applications that the saw mill property was incumbered to the extent of \$1,500, notwithstanding the partial statement, which is true as far as it goes, contained in application 337.

All three policies are filled up on the 13th of March, and apparently by the same person, who must have had the respective applications before him at that time. And when the writer inserted in policy 338, "incumbrances \$1,500" if he had written it in full as it was given in the application it would have been: "Incumbrances \$1,500, mortgage on this and saw mill property, all insured in this company, first of March application takes effect on saw mill." And in the face of that declaration appearing on the policy, as it should have done, or as it may be read as if it were there, it would be impossible to say the company had not notice in writing of the full amount of the mortgages charged upon the saw mill property.

The whole representations need not appear in the application upon which the policy is founded. That is no doubt the proper place for them to be. But if a mistake be made by the applicant in it, he may correct it before the policy issues, by a letter or other due notification of the correction given to the company. So he may say, in answer to any

particular question, "See my answer to the question contained in application 338." And I am of opinion the applicant in effect did so, although not in words as clearly expressed as they might have been. And I am of opinion the company had notice in writing of the actual truth as to the encumbrances by means of the two applications, which they had before them at the same time, and in which the one does refer to the other.

This first objection fails, as it ought to fail.

The other objection, that the assessment was not paid, and that the plaintiff cannot recover upon the policy, because it was void by reason of such non-payment at the time of the loss, requires also to be considered.

The learned Judge who tried the cause was of opinion that the assessment was still unpaid, notwithstanding the acceptance by the defendants of the promissory note before mentioned, because that note was overdue and unpaid, and in the defendants' possession before and at the time of the fire.

The case turns upon a very few facts. The defendants in their letter of the 24th of February, 1877, to the insured, say, "Kindly sign with Mr. Lusty the enclosed note, and we will accept it as payment of assessments on your policies 337, 338, 339." And in their register the assessments in question are stated to be "paid by note at two months from February 19th, 1877." Upon receiving information of the fire, and after the maturity of the note, the defendants wrote to the insured that as the assessment had not been paid, he had lost all claim to compensation for his loss.

The plaintiff says these facts shew the assessment was paid. The defendants deny it.

The statute says, 36 Vic. ch. 44, sec. 44, O.: "If the assessment * * be not paid within thirty days after the day on which the said assessment shall have become due, the policy of insurance, for which such assessment shall have been made, shall be null and void as respects all claim for losses occurring during the time of such non-payment :

Provided always, that the said policy shall be revived when such assessment shall have been paid, unless the secretary give notice to the contrary, * * but nothing shall relieve the assured party from his liability to pay such assessment or any subsequent assessments, nor shall such assured party be entitled to recover the amount of any loss or damage which may happen to property insured under such policy while such assessment shall remain due and unpaid, unless the board of directors in their discretion shall decide otherwise."

As the policy is not absolutely void by default in paying the assessments, but the remedy of the assured for loss happening to him while he is in default is barred, *unless the board shall decide otherwise*, it may be contended there is no objection to the company accepting a promissory note from the insured and another, as in this case, in payment and satisfaction for assessments which were not paid when due. And perhaps it would follow that if the company can enlarge the time for payment, so as to give the assured a remedy for his loss before the enlarged period has expired—that is, if the company can delay the avoidance of the policy for a time—they may do so altogether. It must be remembered, however, that it is *the statute* which declares that if the assessment be not paid within thirty days after it is due, the policy shall be null and void as respects losses happening during such non-payment. And the case of *Merritt v. Niagara District Mutual Ins. Co.*, 18 U. C. R. 529, and *Montreal Assurance Co. v. McGillivray*, 13 Moore P. C. 87, require to be considered upon this point.

Assuming that the company could give an extended day for payment without in the meantime affecting the validity of the policy, and assuming that the company could also take a promissory note as payment of the assessment in place of cash, the question still is, did they do it? The evidence does not shew a perfect agreement to do so. The mere statement by the secretary in his letter that the company would accept the note "as payment of the assessments," does not shew that it was taken in satisfaction

and discharge of the primary liability : *Maillard v. Duke of Argyle*, 6 M. & G. 40.

It is rather a conditional payment : *Belshaw v. Bush*, 11 C. B. 191.

I am disposed to think that the defendants did not mean to abandon their right to have the policy avoided under the statute, in the event of the promissory note, which they took as temporary and conditional payment, not being actually paid at maturity. They meant to give a longer day of payment of the assessment to the insured by way of indulgence and accommodation to him, but not to depart with any of their statutory rights. If the board of directors "in their discretion had decided" to take the note in satisfaction and discharge of the assessment, under section 44, which we think they did not by the letter and entry in the register before referred to, I am not prepared to say they could not have done so by an express agreement to that effect.

The rule will therefore be discharged.

GALT, J., concurred.

Rule discharged.

BLACK V. COLEMAN.

Excessive distress—Special damage—Seizure—What constitutes—C. S. U. C. ch. 73, sec. 2—Construction of.

In an action for excessive distress the plaintiff may recover though no special damage be proved.

A bailiff, under a distress warrant, entered and made an inventory of "the several goods and chattels distrained by me, viz. : In front shop, quantity of millinery," &c., "together with sundry articles on the premises." The tenant then gave to the bailiff the following receipt : "I acknowledge to have received from G., bailiff, all the goods and chattels in house No. 113," &c., "seized for rent," &c., "to be delivered to him, the said bailiff, when demanded," &c.

Held, sufficient to constitute a distress executed.

Quære, whether the C. S. U. C. ch. 73, sec. 2, applies to personal property acquired after 4th May, 1859, by a married woman who was married prior thereto.

THIS was an action for excessive distress tried before Hagarty, C. J., without a jury, at Toronto, at the Winter Assizes of 1878.

The defendant as landlord issued his warrant to the bailiff to distrain on the plaintiff's goods for \$732.85, for rent due on the 1st October, 1878, dated 22nd November, 1878.

The bailiff entered and made an inventory of "the several goods and chattels distrained by me, viz. :

"In the front shop—quantity of millinery, ladies' hats, one show case, millinery, carpet, one set of furniture, together with sundry articles on the premises.

"Dated 23rd November, 1878."

The plaintiff receipted the goods to the bailiff as follows:—

"I acknowledge to have received from E. Gegg, bailiff, all the goods and chattels in house No. 113 King street west, seized for rent at the instance of George Coleman, to be delivered to him, the said bailiff, when demanded, in as good condition as they now are.

"November 23rd, 1878."

On the 28th November a settlement was come to as follows:—

Arrears of rent to 30th September, 1878	\$600 00
---	----------

Cr.

By contra accounts	\$ 95 56
Allowance damages by injury from water	200 00
	295 56

	\$304 44
Mr. Coleman's account	34 00
	\$338 44

The plaintiff in her evidence said: The bailiff put in a distress. He took possession, and made out the inventory. He made a general seizure without distinction of the articles. The place into which he came was the shop and show room. The goods were there to the amount of about \$8,000. He was in possession from pretty early in the morning till one or two o'clock.

The plaintiff went to Coleman and said she would settle, if he would give her credit for the account she had against him, and for \$200 damages done by the water, and he agreed to it. More than half her stock was in the front shop. The shop fixtures and furniture were valued at \$945.

The learned Judge said he was bound by a decision of the Court to say that the goods were not the goods of the plaintiff, who was a married woman, and was married in 1857; and that no recovery could be had, as no special damage was shewn; and he nonsuited the plaintiff.

In this term, February 10, 1879, *J. E. McDougall* obtained a rule *nisi* to set aside the nonsuit, and for a new trial.

During the same term, February 14, 1879, *J. E. Rose* shewed cause. The statute 11 Geo. II. ch. 19, sec. 19, applies to an excessive distress, so as to require the plaintiff to declare specially, and trover will not lie: *Whitworth v. Smith*, 1 M. & Rob. 193; and this same section provides that the plaintiff shall only recover the "special damage" he shall have sustained, and no more. This clearly shews

that proof of special damage is essential. The case of *Chandler v. Doulton*, 3 H. & C. 533, will be relied upon by the plaintiff as shewing that no proof of special damage is necessary. That case is based on a previous case of *Bayliss v. Fisher*, 7 Bing. 153; but both these cases were decided independently of the statute, for in neither of them was the statute set up. Moreover the evidence does not shew that any seizure was ever made. The next point is, that the goods were not the goods of the plaintiff. The property was not separate estate within the meaning of the Married Women's Acts. The only Act that could apply is the Consol. Stat. U. C. ch. 73, sec. 2, but that Act does not apply, as here, to property acquired by a married woman after the 4th May, 1859, who was married prior thereto. The statute speaks of property not then reduced into the possession of the husband, and this could not apply to after-acquired property.

J. E. Macdougall, contra. The statute of 11 Geo. II. ch. 19, sec. 19, only applies to an irregular and not to an excessive distress. The case of *Chandler v. Doulton*, 3 H. & C. 533, is express that in an action for an excessive distress no special damage need be shewn. There it is laid down that the plaintiff is entitled to a verdict with nominal damages, although he has failed to prove any actual damage. See also *Lucas v. Tarleton*, 3 H. & N. 116. The Act of 1859, clearly applies to after-acquired property; at all events the property would come within the 35 Vic. ch. 16, O. Moreover the plaintiff had sufficient possession to entitle her to maintain the action: *Fell v. Whittaker*, L. R. 7 Q. B. 120. There was clearly evidence of a seizure: *Swann v. Earl of Falmouth*, 8 B. & C. 456; *Hutchins v. Scott*, 2 M. & W. 809; *Wood v. Nunn*, 5 Bing. 10.

March 7, 1879. WILSON, C. J.—The question as to her separate property was, as Mr. Rose puts it, that Consol. Stat. U. C. ch. 73, sec. 2, did not apply to property acquired by a married woman after the 4th of May, 1859, who was married before that day.

That section is, that "all her personal property not then (that is, on the 4th of May, 1859), reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after marriage," she shall hold "free from his debts contracted after the said fourth day of May, one thousand eight hundred and fifty-nine, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried."

The section is not very well expressed, and there is ground, from the frame of the section, for Mr. Rose's exception. But I shall not consider it further at present. Such a limited construction would be against the policy of the different statutes which have been passed on the subject.

The next enquiry is, whether the plaintiff is entitled to recover as for an excessive distress, even assuming no special damage was proved.

The case of *Chandler v. Doulton*, 3 H. & C. 553, shews she is. See also *Piggott v. Birtles*, 1 M. & W. 441.

The cases of *Hutchins v. Scott*, 2 M. & W. 809; *Wood v. Nunn*, 5 Bing. 10; *Cramer v. Mott*, L. R. 5 Q. B. 357, and *Swann v. Earl of Falmouth*, 8 B. & C. 456, shew that much less than was done in this case will constitute a distress executed.

The rule will be absolute.

GALT, J., concurred.

Rule absolute.

MCQUEEN V. THE PHOENIX MUTUAL INSURANCE COMPANY.

Insurance—Alienation of property—Conditions of policy—Interim receipts—Part of loss payable to creditors—Right of action—Parties to suit—Releases.

On the 19th of November, 1877, an interim receipt on a stock of goods was made to plaintiff, subject to the conditions of the defendants' printed form of policy then in use, being the statutory conditions, one of which was that "if the property insured is assigned without the written permission endorsed thereon of the agent of the company duly authorized for such purpose, the policy shall hereby become void." On the 28th of November the plaintiff assigned the insured property to one McK., in trust to sell the same and pay plaintiffs' creditors, among whom were McK. and McM. & Co., the amounts due them, and the residue, if any, to the plaintiff. By the policy, which was dated 12th of December, but which was not delivered to the plaintiff until after the fire, which occurred on the 15th of January, 1878, the loss, if any, was to be paid to McK. and McM. & Co., and others as creditors, as their interest might appear. When the assignment was made the defendants' agent who issued the receipt was expressly notified thereof, and assented thereto, and stated that no notice to the company was necessary as the policy was payable to the assignees. The plaintiff sued on the policy setting it out, together with the assignment, and alleged that after satisfying the creditors' claims there would be a surplus coming to him, and that he sued as trustee for the creditors, and in his own interest.

Held, that the policy must be deemed, in the absence of evidence to the contrary, to be the form of policy in use when the receipt was given, it having been accepted by the plaintiff and the action brought thereon.

Held, also, that under the condition there should have been a consent in writing to the assignment even if endorsement thereof on the receipt was not essential; but that the agent who issued the receipt had the power to dispense with such written consent, and that he had done so.

Held, also, that the creditors should have been made parties with the plaintiff, but that this might be dispensed with by obtaining releases of their claims; and a verdict was directed for the plaintiff for the whole amount insured on the production of such releases to the Master.

A temporary insurance by means of an interim receipt is not within the R. S. O. ch. 162, and may be subject to such conditions as the parties agree upon.

ACTION on a fire policy, dated the 12th of December, 1877, for three months from the 19th of November, 1877, on a stock of dry goods, groceries, boots and shoes, to the amount of \$2,000, in the village of Wingham. The loss, if any, to be paid to George McKenzie, McMaster & Company, and others, as creditors of the plaintiff, as their interests may appear.

The declaration alleged that before the making of the policy, to-wit, on the 28th of November, 1877, by an in-

strument under seal, and made between the plaintiff and the said George McKenzie, the plaintiff assigned to the said George McKenzie (among other property) the property in the policy mentioned, in trust to sell the said property, and out of the proceeds thereof in the first place to pay all costs, charges, and expenses connected with the trust, and in the second place to pay the creditors of the plaintiff, (and, among others, the said George McKenzie, McMaster & Company, and others who were then the creditors of the plaintiff,) the amounts due to them, and the residue, if any, to the plaintiff: that a surplus remained after paying all the creditors of the plaintiff, which was payable to the plaintiff: that the defendants at the time of the making of the policy were aware of the said trust assignment; and that the said creditors were interested in the said property until the time of the fire to the extent of \$1,200, and the plaintiff as to the residue; and that the property was destroyed by fire; whereby the plaintiff as trustee for the said creditors, and in his own interest, brings this suit.

The policy was subject to the statutory conditions and certain variations and additional conditions, all of which were set out in the declaration.

The sixth plea which is the only one material to be set out, was, that before the making of the policy, to-wit, on the 19th November, 1877, the plaintiff made application for insurance to the defendants, and the agent of the defendants granted to the plaintiff a receipt or memorandum in writing, in the words and figures following:

"Phoenix Mutual Fire Insurance Company.

"Head Office, Toronto.

"Provisional receipt No. 9, Agent's Office, 19th Nov. 1877.

"Received from James McQueen, (post office) Wingham, twenty-two dollars, being the premium for an insurance to the extent of 2,000 dollars on the property described in his application of this date, numbered 9, subject however to the approval of the Board of Directors in Toronto. And it is hereby declared, that the property so described shall be held insured for thirty days from this date, or until notice be given that the proposal is declined, but the insurance hereby made is subject to all the conditions, rules, and regulations contained in and indorsed upon the printed form of policy in use by the company at the date hereof.

"Cash received, \$18.50."

(Signed)

"THOS. HOLMES."

"N.B.—In the event of the above insurance not being completed, an equivalent portion of the premium now paid will be retained for the period during which the company has been upon the risk."

That an undertaking was taken for \$3.50, the balance of the premium; that the said receipt operated as an insurance on the said property to the extent of two thousand dollars for the space of thirty days, unless cancelled within that period, subject to all the conditions, rules, and regulations contained in and endorsed upon the printed form of policy in use by the defendants at the date thereof: that the receipt was not cancelled within thirty days from the date thereof, but while the same was in full force, to-wit, on the twelfth day of December, 1877, in accordance with the said application of the plaintiff, the defendants executed and delivered the policy in the declaration mentioned. And the defendants say that all the conditions, rules, and regulations contained in and endorsed upon the printed form of policy, as set forth in the declaration, are all the conditions, rules, and regulations contained in and endorsed upon the printed form of policy in use by the defendants at the date of the said receipt. The defendants further say, that at the time of the making of the application for insurance the plaintiff was the legal and equitable owner of the said property, and that after the making of the said application, and while the said property was so insured as aforesaid under the said receipt subject to the said conditions, to-wit, on the twenty-eighth day of November, 1877, the plaintiff, without the written permission endorsed on the said policy by an agent of the defendants duly authorized for such purpose, as required by the conditions in that behalf endorsed on the said policy, and without the knowledge and consent of the defendants, executed and delivered to one George McKenzie the deed of assignment of the said property mentioned and referred to in the said declaration, by reason of which the said policy and the said insurance so effected with the defendants became void. Issue.

The following replication to the sixth plea, on equitable grounds, was added on the argument by leave of the Court:

that the said policy was not issued and delivered to the plaintiff until after the fire and loss in the declaration mentioned : that the plaintiff, before the loss, gave notice of the assignment to the agent of the defendants, by whom the said interim receipt was issued, and with whom the plaintiff effected the insurance by means of the receipt, and the said agent, being duly authorized in that behalf, then assented to and permitted the said assignment, and informed the plaintiff that it was unnecessary to give any further notice of the said assignment to the defendants, and the plaintiff not having received the said policy it was impossible for him to endorse a permission of the said assignment thereon. Issue.

The cause was tried before Hagarty, C.J., without a jury, at Goderich, at the Fall Assizes of 1878.

The different documents were put in and admitted.

The application was dated 19th November, 1877, the terms of which were "loss, if any, payable to George McKenzie and McMaster & Co."

The fire occurred on the 15th January, 1878. The policy was dated 12th December, 1877, but was not delivered to the plaintiff until after the fire.

George McKenzie said : I am the McKenzie mentioned in the application as one of the creditors. I was present when the application was made for the insurance. The plaintiff was there. We went to Mr. Holmes's office. That was on the 13th of November. It was to the amount of \$4,000. Holmes said he would put it in the Western. He asked how long we wished to insure, and then he wanted to know why we only wanted it for three months. We told him McQueen intended to run the goods off, and that at the end of three months he would insure for a less amount. Then the application was made, and shortly after he called me in and said the Western had accepted \$2,000, and he was going to put the other \$2,000 in the Phoenix. He said he had filled up a policy. He filled in the application. He did so knowing that McQueen had called a meeting of creditors, on the 12th of November, and

that the creditors insisted the goods should be insured. Nothing was said of the assignment at that time. The application was drawn out first in the Western on the 13th of November, and this application on the 19th. Up to that time nothing was said about the assignment. Up to the time when the trust deed was given on the 28th of November, Mr. McQueen went on carrying on the business. I went to Mr. Holmes's office before the deed was made, and told him that McQueen wanted to make an assignment for the benefit of his creditors; that some of them were crowding him. I asked Mr. Holmes if he could fill up a document of the kind. He advised me to go to you (Mr. Cameron, of Goderich). I asked Mr. Holmes if it was necessary to notify the insurance company of the proposed assignment, and, as I understood him, he said No, as the policy was payable to us it was not necessary to notify the company. In pursuance of that arrangement I got the document drawn. When it was drawn I told Mr. Holmes of it. I asked him to write to the company, and tell them what had been done. He told me on one occasion there was no necessity, as the policy was payable to the creditors, and I being one (and the deed being to me,) it was not necessary. After the assignment I went to the shop and sold goods. McQueen continued there all the time up to the fire. McQueen was carrying on business all the time. He was not insolvent. I got the policy from Mr. Holmes the morning after the fire. It was not handed over either to McQueen or to myself till after the fire. I knew nothing of the terms of the policy. If the policy is paid there will be over \$500 coming to McQueen after payment of all his debts.

John Brandon said: I am manager of the company. I was not aware of the deed until after the fire. In the conduct of insurance business it is considered very material to get notice of an assignment of the kind for various reasons. The character of the person into whose possession the property may pass and other matters are very necessary to enable the board to decide whether they will be justified

in continuing an insurance. When the property is assigned we look upon the party making 'an assignment as commercially dead, and unable to pay assessments. Notice could not have been given to the company without my being aware of it.

Cross-examination.—It would not increase the rate of premium. I did not know either of the parties personally till after the fire. I knew Mr. McKenzie. Had we known it would have made a difference decidedly in the insurance. We would not have insured at all. The knowledge of the assignment did not come to me until after McKenzie called at our office in January. When we learned of the assignment we made up our minds not to pay. We found the case surrounded by a great many suspicious circumstances. McKenzie called in January; he did not tell me of the assignment. In January I did not know of the assignment. The letter of the 13th of February to McKenzie was written after I became aware of the assignment.

Thomas Holmes said: I am the agent for the company at Wingham. After the application McKenzie came and told me he had been appointed manager or assignee of McQueen, or something like that, and he asked me if that would make any difference, as the loss was made payable to the creditors. I really cannot say whether McKenzie asked me to notify the company.

Cross-examination.—My powers were to take applications, and to forward them to Toronto, and to give interim receipts. I was agent, and had whatever power that gave me.

The counsel for the defendants contended that the plaintiff, if entitled to recover, could recover for only \$500.

All matters were left to the Court, and a formal verdict was entered for the defendants, damages being assessed contingently at \$2,050.

In Michaelmas Term, November 19, 1878, *Robinson*, Q. C., obtained a rule calling on the defendants to shew

cause why the verdict for them should not be set aside, and a verdict entered for the plaintiff with damages at \$2,050, or for such sum as to the Court might seem right, or to enter a verdict for the plaintiff upon all the issues except the issue raised upon the sixth plea, or upon such issues as the Court might direct, pursuant to the Common Law Procedure Act; and for leave to amend the pleadings, if necessary, by adding an equitable replication to the sixth plea.

In this term, February 6, 1879, *W. A. Foster* and *J. B. Clarke* shewed cause. The equitable replication does not state that the defendants ever had notice of the assignment made by the plaintiff of the goods he had applied to have insured, nor that the plaintiff or his agent or assignee, *McKenzie*, ever desired the agent of the defendants who took the risk to give such notice to the company. The statutory conditions are endorsed upon the policy. The fourth condition, so far as it is material here, is: "If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void." The notice which the plaintiff alleges he gave of the assignment was to *Mr. Holmes*, the agent of the company, who took the risk, and filled up the application, but a notice to him after he had filled up the application, and after his duty as such agent was over, was not a proper notice of such a fact, because *Holmes* had no authority to receive it, nor could he waive the performance of any act which was required on the part of the plaintiff; and, if he could, he did not do so, and he could not, even if he had been authorized, have done so without a writing to that effect, and duly signed, according to the twentieth condition of the policy. The plaintiff does not say he did not know what the conditions of the policy were when he made the application or the assignment, but only that by reason of not having the policy it was impossible for him to endorse a permission of the said assignment thereon. If the plaintiff is entitled to recover at all he is only entitled to

his own personal interest, and that is only \$500. They referred to *Hendrickson v. Queen Ins. Co.*, 31 U. C. R. 547; *Billington v. Provincial Ins. Co.*, 2 App. 158; *McCrea v. Waterloo County Mutual Ins. Co.*, 1 App. 218; *Shannon v. Gore District Mutual Ins. Co.*, 2 App. 396; *Hawke v. Niagara District Mutual Ins. Co.*, 23 Grant 139; *Parsons v. Queen Ins. Co.*, 43 U. C. R. 271.

Robinson, Q. C., contra. There is no evidence that the policy now sued upon was "the printed form of policy in use by the company at the date hereof," that is at the date of the interim receipt. [*Foster*.—The fact that the plaintiff has received and acted upon the policy, and now sues upon it, are sufficient evidence of that fact.] It is said, however, that the policy has become void, because the assignment to McKenzie was not permitted by the company by a writing to that effect endorsed upon the policy by an agent of the company authorized for such purpose. But that could not be done, because at the date of the assignment the policy had not been made by the company, and in fact the policy was not delivered to the plaintiff until after the fire. It has not been determined yet whether the R. S. O. ch. 162, can be held to apply to insurances until the policy has been made; and it is quite possible it does not apply to what are called "interim receipts," for the statute throughout speaks of a *policy*. If the case then is not clearly within the Act the plaintiff must recover. In *Parsons v. Queen Ins. Co.*, 43 U. C. R. 271, it was assumed, as the plaintiff's counsel had assumed, that an interim receipt, issued, as in this case, in the form that it was to be subject to all the conditions contained in and endorsed upon the printed form of policy in use by the company at the date of the receipt, was made subject to the statutory conditions; but that it was not necessary to have any notice, which was required to be endorsed on the policy, endorsed on the interim receipt before the policy issued, although notice of such matter should be given to the company, or to their authorized agent, and the assent of the company or of the agent should be duly given

thereto. Here that notice was duly given. It was also objected that the plaintiff was not the person entitled to maintain this action, because of the assignment he had made to McKenzie. That assignment was of the whole legal interest of the plaintiff in the goods, but it was in trust for the payment of his creditors, and the surplus, if any, after the debts were paid, was to be paid to the plaintiff. He is entitled to sue in respect of that interest, which it is sworn amounts to \$500, and which belongs only to himself, and if he can sue for that amount he can recover the residue for the benefit of those who are interested in it. If McKenzie should sue as having had the legal interest in the goods, and as having the legal title to the insurance money payable in respect of them, he may be joined with the present plaintiff. It is only a question of parties, and if McKenzie alone should sue, the Court may perhaps make an order that the persons who are to receive the money beyond the plaintiff's own share of it shall file releases of their claims, and then the verdict may be entered for the whole amount of the insurance money on the record. He referred to *May on Insurance*, 131-132; *Naughton v. Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121; *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *Dear v. Western Ins. Co.*, 41 U. C. R. 553; *Park v. Phoenix Ins. Co.*, 19 U. C. R. 110, 119, 120; *Sansum's Insurance Digest*, 102; *Scanlon v. Union Fire Ins. Co. of Baltimore*, 4 Bissell 511; *Holbrook v. American Ins. Co.*, 1 Curtis C. C. 193; *Manley v. Ins. Co. of North America*, 1 Lansing 20.

March 7, 1879. WILSON, C. J.—It is clear the plaintiff cannot recover in this action if the statutory conditions are to be deemed to be applicable to and to control the document which is called an interim receipt. The defendants say the statutory conditions do govern it, because it expressly provides that "The insurance hereby made is subject to all the conditions, rules, and regulations contained in and endorsed upon the printed form of policy in use by

the company at the date hereof"; and that as the plaintiff did, after the date of the receipt, assign the property insured by it without the written permission of the company endorsed on the policy by an agent of the defendants duly authorized for that purpose, he has lost all claim to compensation.

The plaintiff says the conditions cannot apply, because he "not having received the said policy, it was impossible for him to endorse a permission of the said assignment thereon."

In *Hawke v. Niagara District Mutual Ins. Co.*, 23 Grant 139, the learned Vice-Chancellor Proudfoot was of opinion the necessary endorsement might have been made upon the receipt. While in *Parsons v. Queen Ins. Co.*, 43 U. C. R. 271-279, it was held not necessary to do so: that the terms of the receipt in that respect were sufficiently complied with by giving notice of the fact in question, and receiving the assent of the company thereto by their agent authorized to effect interim insurances. In both cases it is considered that the receipt may be made subject to the conditions to be endorsed upon the policy according to the terms of the receipt, although in neither case does it appear the applicant or insured knew what those conditions were.

In the case of *Eureka Ins. Co. v. Robinson*, 56 Penn. 256, it was held the interim receipt, although not referring to any such conditions, must be subject to the ordinary policy conditions, otherwise the company upon a mere interim insurance would be under a more extensive liability than they would when they had perfected the contract by the issuing of a policy.

The interim receipt, as it is called, is not very accurately described by that name. It may be *interim* as regards a contract being subsequently to be made by the company—that is, it may be a mere acknowledgment of the receipt of so much money, while the application or proposal is under consideration, without being a contract in any form, as in *Linford v. Provincial Horse and Cattle Ins. Co.*

Limited, 10 Jur. N. S. 1066. Or it may be *interim* as regards some stipulations which are usually contained in it in this country and the United States; that is, it may be a present and actual insurance to the applicant while his proposal is under consideration. In that case the term *receipt* very inadequately and erroneously describes such an instrument, which is to all intents and purposes a veritable contract.

The instrument in this case while it was in force was a contract, by which the plaintiff was insured for thirty days from its date, or until notice was given that the proposal for insurance was declined, and it was expressly made subject to all the conditions of the printed form of policy which was then in use by the company.

While an application which is subject to approval is under the consideration of the directors of the company, and they have to determine whether they will approve of it or not, the temporary or interim assurance is not within the operation of R. S. O. ch. 162. That period of protection is given to the applicant for his benefit. He is insured for a certain time, and during that time he knows he need not look for any other insurance.

The company may, during that period, impose upon the applicant such conditions as they please, for there is as yet no completed contract, and there may never be one, for it may all end by the preliminary and provisional arrangement never being perfected.

The company may, therefore, declare that such temporary insurance shall be subject to such conditions as will not defeat the purpose and object of the contemplated arrangement.

An agreement that the preliminary insurance shall be subject during that time to the conditions which are contained in the form of policy which is then in use by the company, is in every respect a reasonable term of contract.

It may be said that it is not so, because the applicant does not then know what the conditions are, and in by far the greater number of cases that certainly is so. But if he

bargain in that way, (leaving fraud out of view), he must abide by his bargain. He could not compel the company to give him anything different from that which they had engaged to give and he had agreed to take: *Jacobs v. Equitable Ins. Co.*, 18 U. C. R. 14, 373. He knows, or must be presumed to know, that the company does not absolutely agree to pay every loss by fire, however caused, and that there is a difference of risk to a building according to the use it is put to; and that the company must provide against wilful fires or hazardous trades, and the like. He knows in fact that there are, and must be, some conditions upon which they are willing to run the risk for a comparatively small sum to pay a much larger sum on a particular—I do not like to say *certain*—event. These companies have no peculiar common law obligations imposed upon them in the prosecution of their business, more than other persons who or companies which carry on other kinds of business. Their liabilities are determined by the terms of the special contract which they make. They are not, as common carriers are, liable for every casualty to goods excepting those arising from the act of God or the Queen's enemies. And, although common carriers cannot alter or limit their liability by notices, advertisements, or the like, unless it is proved that such notices or advertisements were communicated to or came to the knowledge of the sender of the goods, such a rule can in no way be applied to insurance companies.

The plaintiff was bound to take notice of the conditions of the form of policy of the company which was in use at the time of the application. The condition which the defendants say was upon the policy then in use, and which is applicable in this case, is the fourth condition set out in the declaration, and is the same as the fourth statutory condition contained in the R. S. O. ch. 162. The words are, so far as it is material here: "If the property insured is assigned without a written permission endorsed hereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void."

The plaintiff says it was not proved that the statutory condition, and the others now upon the policy, were those which were contained in and endorsed upon the policy at the time of the application.

The policy which the plaintiff has accepted and sued upon may be held to be the form of policy which he contracted for, in the absence of proof to the contrary, and there is no reason to doubt that in fact it is the same form of policy.

The plaintiff also says he gave notice of the assignment to the agent of the defendants by whom the interim receipt was issued, and with whom the plaintiff effected the insurance by the receipt; and the agent, being duly authorized in that behalf, then assented to and permitted the said assignment, and informed the plaintiff that it was unnecessary to give any further notice of the said assignment to the defendants.

If the assignment had been made after the policy was issued, I should be of opinion the agent who took and forwarded the application and gave the interim receipt had not the power to assent to it on behalf of the company, without direct proof that he had the further authority to assent to such assignment.

Had he the power to give assent to the assignment, while the application was subject to approval and the temporary insurance was in force? I think he had. His business was to take all preliminary measures and to do all precedent acts to the procuring of the policy.

It would be the business of the agent to receive notice of the withdrawal of the application, if the applicant withdrew it, or if he made any amendment of or made any change in the nature of the property insured, or made any transfer of it, or if he became insolvent or died, because these are all matters antecedent to the issuing of a policy, and subjects properly coming within the line of duty of a person who is authorized to receive applications for a policy and to grant an insurance pending the consideration of the application.

I think the evidence shews the agent did receive notice of the assignment, and that he was requested to inform the defendants of it, but the replication does not expressly state that fact, although it may be inferred from the allegation that the agent "informed the plaintiff that it was unnecessary to give any further notice of the said assignment to the defendants;" and I think also the agent then verbally assented to and permitted the assignment, and that he informed the plaintiff it was unnecessary to give any further notice of it to the defendants.

The plaintiff did all he was bound to do, but get the assent in writing of the agent written upon the interim receipt or otherwise, if that was his duty.

The replication does not shew why it was not necessary for the plaintiff or the agent to give any *further* notice of the assignment to the defendants. But the evidence shews it was because the application informed the company that the loss, if any, was payable to the creditors of the applicant, of whom George McKenzie was one, and that such statement in the application was notice enough of the assignment of the goods made subsequent to the application. The company bargained that their assent or that of their agent to any change in the ownership of the insured property should be given in writing. That was not procured by the plaintiff or by the assignee.

They were misled, I think, by the agent, who told them it was not necessary to do so. That no doubt was a mistake, for the effect of making the loss payable to a third person is not to constitute him the assignee of the goods, or to give him any interest in them, but to make him, as it were, the assignee of the policy, leaving his rights to be affected by the due observance or non-observance by the insured of his obligations under the policy—that is, the payee's right to receive payment depends upon whether the insured, if he had made no such stipulation as to the loss being paid to such other person, would himself have been entitled to payment; for if the insured forfeit his right to it by non-compliance with the conditions, the

payee loses his right to it also: *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 609 (1858).

I cannot think that in every case of assignment the policy shall become void unless the assent of the company is endorsed upon it, notwithstanding the very positive words of the statute.

If the plaintiff, instead of informing the agent, had gone to the office of the defendants, and had told their principal officer of the assignment to McKenzie, and had asked him for a written assent to it, and he had answered, as the agent here did, that it was not necessary to give any written assent, as the fact of the assignee being the same person who was already the payee of the loss dispensed with the necessity of it in this case—that being a case of mutual mistake, the intent of the parties being to maintain and not to defeat the contract, would surely not be allowed to operate to the prejudice of either party, and to destroy the very thing they were desirous of maintaining.

It is manifestly the duty of the person applying for relief in such a case positively to establish his right to it, when the statute relating to this matter was passed for the purpose of putting an end to such questions, and to substitute instead a species of evidence which cannot be disputed. But fraud, mistake, and inequitable and unconscionable conduct must still be subjects for relief, as much so since as they were before the statute.

Now, I do not see any distinction in this case between a communication made by the applicant to the company—that is, at the head office of the company, to any of the principal officers competent to receive such communication, and to assent or to refuse to assent to it, and if it were assented to to make the necessary note or endorsement of it in writing—and the communication which was made in this instance to the agent who took the risk, because he had, as I have already said, the power to give the necessary assent, and to put it in writing, as it was still in the form of a mere proposition; and it would be his duty to inform the company of what he had done, and if he did not, it would

not operate to the prejudice of the applicant, but to the prejudice of his own employer: *Patterson v. Royal Ins. Co.*, 14 Grant 169; *Franklin Fire Ins. Co. v. Massey*, 33 Penn. 221.

Here the agent misled the applicant, as I have stated, and the company whose agent did so should not be allowed to take advantage of the error he has led the applicant into to his prejudice. It is not like the case of both applicant and agent knowingly violating some plain written or printed direction to the prejudice of the company. And therefore I am of opinion relief may here be given.

Where a company, upon being notified in writing of repairs made, were requested to allow the same, and to endorse the allowance on the policy, and they waived making the endorsement, and discharged the plaintiff from the consequences of not having it endorsed, and they continued and confirmed the policy, I was of opinion they were bound by their conduct from setting up the want of endorsement as a defence to an action on the policy: *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69, at pp. 82-84.

In *Powell v. Smith*, L. R. 14 Eq. 85, the Court decreed specific performance of an agreement for a lease for seven or fourteen years, although the lessor alleged he was mistaken in thinking that the option was with him whether the lease should be for the seven or the fourteen years, and not with the tenant. The lessee had made no statement to the lessor that he would at law have the option. If he had, I presume specific performance would not have been decreed.

In *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223, Lord Chelmsford said, at p. 234: "And there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake."

There are some observations of James, L. J., in *Lee v. Lancashire and Yorkshire R. W. Co.*, L. R. 6 Ch. 527, which are in principle applicable here.

He said, at p. 532: "The only equity raised by the bill is, that the agent of the company agreed with the plaintiff that he should not be excluded from further compensation," and "Of course, it might be open to the plaintiff to say that if the receipt does exclude him from further compensation, then he has a right to have it set aside, because he gave it under a mistake produced by the representations of the company's agent, who stated that it would not exclude him."

In my opinion the statement of the agent is as binding here as if it had been the statement made by the company, and it should not exclude the insured, who would certainly have got the assent in writing then if it had not been for the misconception and misstatement by the agent to the assured of what the law was in such a case, when the payee of the loss became the assignee of the goods and of the policy.

It is said the endorsement could not be made on the policy. The language is "endorsed *hereon*"; and before the policy is issued that may well apply to the receipt.

The substantial part of the condition was to have a *written* consent, and it may be that a separate writing to that effect would have been a sufficient compliance *cy-pres* with the terms of the condition. If the condition could not in any form be complied with at that time, then it would have no force at all; but that I think was not the nature or essence of the agreement.

As I am of opinion the defendants are liable upon the facts of the case, the finding should be entered for the plaintiff on his equitable replication; but it appears to me it should be answered by adding to it; "and that it was not necessary to get any writing from or on the part of the company assenting to the said assignment," after the words "that it was unnecessary to give any further notice of the said assignment to the defendants."

The next question then is, whether the plaintiff, who sues alone as the insured, is, on the facts of this case, the proper person to bring this action.

In *Blair v. Ellis*, 34 U. C. R. 466, it was held that a person having a debt due to him may assign it to a firm of which he is a co-partner, and that they may both then sue upon it. No doubt a promissory note could always be so endorsed.

In equity, I believe, it is quite clear that all persons who are interested in this money would have to be parties to a suit for its recovery, either made so in the first instance or in the Master's office, otherwise the defendants could not safely pay the money.

We follow the course taken in *Dear v. Western Assurance Co.*, 41 U. & R. 553, as substantially answering all purposes if it can be adopted. If it cannot, I see no other course left to us than to make all necessary persons parties to this suit, under the very extensive equitable powers conferred upon us by the R. S. O. ch. 49, sec. 5; and thereupon to "pronounce such judgment, or make such order or decree as the equitable rights of the parties respectively require."

The case will have to stand until the plaintiff is in a position to say which course he will take, when the proper direction will be pronounced.

I should add, that it appears to me—as the plaintiff sues as the person insured, and the pleas shew he assigned the goods to George McKenzie, which the plaintiff admits, and as the plaintiff in his replication asserts that he did everything which it was his duty to do to perfect the title of George McKenzie as such assignee, and that it was the defendants' fault it was not perfected—that it would be more congruous with the fact of the insured, the assignor, being the plaintiff, to plead the replication as an estoppel to the defendants pleading the matters in the pleas, to which the replication is pleaded. The plaintiff may alter his replication in that respect if he desire to do so.

The judgment then will be, that the rule will be absolute on the plaintiff producing to and filing with the Master a release from all necessary parties of their claims to the insurance money, proof of necessary parties to be given

by affidavit to the satisfaction of the Master. Such release to handed over to the defendants or their attorney by the Master.

GALT, J., concurred.

Rule accordingly.

MCCARTHY V. ARBUCKLE.

Lost deed—Evidence of—Conveyance after marriage under prior parol agreement—Unregistered title—Registry Act of 1865, 29 Vic. ch. 24, sec. 62—Lien for improvements.

In ejectment the plaintiff claimed under a deed from the patentee of the Crown to his father. The deed was not produced, but it was held that the evidence, set out below, was sufficient to prove its existence, and of its having been subsequently burnt.

In this case the defendant claimed a lien for his improvements on the land: *Held*, that he was entitled to such improvements, as the evidence shewed that they were made under the belief that the land was his own. The patent issued in 1839. The patentee conveyed to M. in the same year, and M. to the plaintiff in 1867, which was never registered. Defendant claimed through his wife, who was one of the co-heiresses of the patentee. He alleged that before his marriage, which took place in November, 1866, she agreed verbally to convey it to him after the marriage; and the deed under which he claimed was executed and registered in October, 1867: *Held*, that the conveyance to defendant was voluntary, and therefore could not prevail by reason of its priority of registration.

Per GALT, J.—If the defendant had been a purchaser for valuable consideration, he would have been entitled to succeed under 29 Vic. ch. 24, sec. 62, by reason of such priority. *Quere*, *per WILSON, C. J.*, whether section 62 applies to cases where the patent has issued before its passing.

THIS was an action of ejectment to recover possession of lot No. 2, in the 7th concession of Gloucester.

The plaintiff claimed title under a deed from one John McCarthy and wife, dated 2nd December, 1867, of the south half of the said lot, and registered on the 9th December, 1867.

The defendant claimed title under and by virtue of a deed of bargain and sale of the said lands, made by one Charles Masson to the said defendant, dated 3rd October, 1867.

The defendant also claimed a lien, under the statute in that behalf, on the said land for his improvements made thereon, on the ground that such improvements were made under the belief that the premises were his own.

The cause was tried before Morrison, J., without a jury, at Ottawa, at the Fall Assizes of 1878.

The plaintiff's title was as follows :

Patent from the Crown to George Brownlee, dated 25th April, 1839.

Deed from George Brownlee to John McCarthy, dated 4th July, 1839 ; and, lastly, the deed already mentioned from John McCarthy to the plaintiff.

The deed from Brownlee was not produced, nor had it been registered. It was alleged to have been burnt.

The material question of fact at the trial was as to whether such a deed had ever been executed.

The judgment of the learned Judge at the trial, was as follows :

"After consideration of the points raised, on the whole I will enter a verdict for the defendant, as both parties say they will take the opinion of the Court.

"I find that the plaintiff's father had in his possession from the year 1839, a deed or instrument in writing purporting to be executed by the grantee of the Crown, transferring or conveying to the plaintiff's father his interest in the lands in question, and that that document was destroyed by fire about the year 1867 : that the defendant's wife is co-heiress of the grantee of the Crown : that at the time of the execution of the deed under which the defendant claims, and of the conveyance from the defendant's wife to the defendant, neither of the parties had any knowledge of any claim of the plaintiff to the land, or of the title under which he claims.

"I find also, although not without some hesitation, that there was a verbal agreement between the defendant and his wife before their marriage, that in consideration of

their then intended marriage, the defendant's wife should convey the land in question to the defendant.

"I give no opinion as to the effect of the registry laws, or upon the effect of the verbal agreement so made before marriage.

"If the Court should be of opinion that the plaintiff is entitled to recover, then it is understood it will be for the Court to say whether the defendant is entitled to a lien for his improvements. If entitled, then the amount is to be determined by a reference to the Deputy Clerk of the Crown or Master in Chancery, or to such officer as the Court may direct."

In Michaelmas term, November 26, 1878, *Snelling* obtained a rule *nisi*, under the Common Law Procedure Act, to set aside the verdict for the defendant and to enter a verdict for the plaintiff.

In this term, February 12, 1879, *McMichael*, Q. C., shewed cause. There is no proof of the conveyance from the patentee of the Crown to John McCarthy. There is no one who swears to its genuineness. The rule that no proof is required of a deed thirty years old only applies to a deed which is produced, and when produced shews everything to be regular and without suspicion: *Taylor* on Evidence, 7th ed., pp. 105, 1533, secs. 87, 1845; *Doe dem Neale v. Samples*, 8 A. & E. 151; *Bishop of Meath v. Marquis of Winchester*, 3 Bing. N. C. 200, 1. Here the deed is neither produced nor any evidence given of its genuineness, and the evidence given is of such a character that the deed, even if produced, would be looked upon with suspicion. The next point is, that the plaintiff's title is not registered, whereas the defendant's deed is. Since the 29 Vic. ch. 24, sec. 62, registry is in every case essential to preserve priority as against a subsequent deed. The defendant's deed, therefore, though subsequent to the plaintiff, must prevail against it by reason of the prior registration. The plaintiff, however, contends that the defendant is not a purchaser for valuable consideration, because the deed to the defendant was made after marriage. The deed was

made in pursuance of an oral agreement made prior to marriage. An oral agreement is in such case sufficient to constitute the deed made in pursuance thereof, a deed made in consideration of marriage, and therefore for valuable consideration. It may be void as against creditors, but not as against purchasers: *Warden v. Jones*, 2 DeG. & J. 76; *Randall v. Morgan*, 12 Ves. 67, 74; *Dundas v. Dutens*, 2 Cox 235; *De Beil v. Thomson*, 3 Beav. 469; *Hammersley v. Baron De Biel*, 12 Cl. & F. 45; *Jeston v. Key*, L. R. 6 Ch. 610; *Coverdale v. Eastwood*, L. R. 15 Eq. 121; *Collet v. Collet*, 1 Atk. 11; *Peachey on Marriage Settlements*, 63. In any event the defendant is entitled to a lien for his improvements under R. S. O. ch. 95, sec. 4, for it is clear that they were made under the belief that the land was his own.

Snelling, contra. There is clear evidence of the deed to John McCarthy, and that it was subsequently burnt. The learned Judge has expressly so found. All he meant by the use of the word "purporting," was that the deed was not produced. The existence of the deed and its subsequent destruction having been established, a foundation for secondary evidence was laid, and the secondary evidence given is clearly sufficient. Then as to the effect of the Registry Act of 1865. The case of *Jones v. Cowden*, 34 U. C. R. 345, 352, shews that the Act does not apply to a prior unregistered title from the patentee of the Crown, so as to require registration of such title to preserve its priority. The deed to the defendant was clearly voluntary. A post-nuptial settlement made under a prior oral ante nuptial settlement is merely voluntary, and void as against purchasers for value. The case of *Trowell v. Shenton*, L. R. 8 Ch. D. 318, is express on the point, and overrules the cases relied upon by the defendant. The evidence, however failed to establish any such oral agreement. The learned Judge, although he finds on the point, says he did so with great hesitation. There can be no lien for improvements. The defendants cannot on the evidence be deemed to have entered under a *bona fide* belief of title.

March 7, 1879. GALT, J.—The defendant defended for the whole, consequently the defendant is entitled to a verdict for the north half under any circumstances.

It is plain the learned Judge entered a verdict for the defendant only for the purpose of not changing the possession, or of depriving the defendant of his claim to be paid for improvements in case the Court should be of opinion that under the circumstances he is entitled to such relief.

I cannot refrain from expressing surprise at the manner in which both the claim and defence have been spread upon the record in this case. The plaintiff claims the whole lot, when, according to his own evidence, he has title to only one half, and the defendant defends for the whole, although he is interested in and claims title to only one-fourth.

The evidence satisfies me that the instrument under which the plaintiff claims purported to be a deed from the patentee of the Crown of the south half of lot 2, in the 7th concession of Gloucester, to his father John McCarthy.

John McCarthy, states: "I knew G. Brownlee, the patentee of the land in question. I bought the land from him in 1832 or 1834. I paid him about \$60 or \$70. I did not then get a deed, but got authority to hunt up the land, and locate it, in consideration of the money. I got the patent from the Crown in 1839. I got a deed from him after the patent; that deed was witnessed. At that time there were no lawyers. R. Traveller was a notary public, and I shewed the deed to him, that is, I shewed the patent to him. He said I know all about it, and will draw the deed up for you. It was signed G. Brownlee. There were witnesses to it. The deed was destroyed by fire in 1867. It was a fire on my premises. I paid the taxes all the time. I got improvements made on it—settlement duty.

On cross-examination he said, "I knew Brownlee, but not long before I bought the land. I got a location ticket from him. I got Mr. McLaren to locate it for me."

McLaren says: "I know lot No. 2 in the 7th concession. I located it. McCarthy told me to locate it. After I got it located McCarthy went with me to the land, and to see

if he would like it. We did settlement duty upon it at the instigation of Mr. McCarthy."

Mr. Ross, the County Judge, says: "I remember John McCarthy shewing me a *deed* of some land—a *deed* and patent. I think it was in the year 1863 or 1864. As well as I can remember, the grantee in the one seemed to be the grantor in the other. It was in the hand-writing of R. Traveller. My impression is, that the land was on the Ottawa. I cannot tell the lot. The object of bringing the deed was to get it registered. I told McCarthy to hunt up the witnesses. As I remember there was nothing wrong with it."

I think on this evidence there can be no doubt that the instrument in question was a deed, and that it was executed by the patentee.

John McCarthy swears positively that it was, and his whole conduct, corroborated as it has been by McLaren and Mr. Ross, in respect of his locating the land, doing settlement duties, and producing the deed and patent to Mr. Ross, and to the fact of his having paid taxes on it up to the time of the occupation by the defendant, which was not disputed at the trial. I am therefore of opinion that, so far as the paper title is concerned, the plaintiff is entitled to recover.

A question however appears to have been raised at the trial as to the effect of the Registry Laws, and it was also mentioned in the argument before us.

It arises in this way: The deed from Brownlee to John McCarthy, in July 1839, was never registered. The law respecting registration at that time was such that until after some deed affecting lands had been registered the registry laws had no operation: 35 Geo. III. ch. 5, sec. 2, Revised Statutes of Upper Canada, vol. i, p. 48. It was therefore unnecessary for McCarthy to register the deed from Brownlee, and, until he did so, the title was what we know as an unregistered title. The law remained in this state until 1865, when by 29 Vic. ch. 24, sec. 62, it was enacted that, "After any grant from the Crown of lands in

Upper Canada and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in such grant shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such instrument is registered in the manner herein directed before the registering of the instrument under which such subsequent purchaser or mortgagee may claim."

There can be no doubt the intention of the Legislature was to render registration necessary in all cases, in order to protect the interest of persons holding an unregistered title against any subsequent grant or mortgage made to a purchaser or mortgagee for valuable consideration.

Provision was made, by the 46th section, for the proof of any instrument where the witnesses were dead or out of the Province; and there was nothing to have prevented the original grantee of the patentee putting his deed on record after the passing of the Act, as it was not destroyed until 1867. I see, therefore, nothing in this case to prevent the statute operating.

The question then arises, is the defendant a purchaser for valuable consideration? The evidence given by defendant on this point was: "I was married in November, 1866. She" (referring to his wife, who was one of the heiresses-at-law of the patentee,) "said she owned some property in the township of Gloucester, if there was some person to look after it. I told her I would try, and I have looked after it from that day to this. That conversation took place about three months before we were married. After I found out she had the land we made an arrangement between us, and after marriage she was to deed the land to me. That was one of the reasons of my marriage."

In cross-examination, he says: "*This conversation took place the summer before we were married. It was not referred to again until after we were married.*"

In October, 1867, after the marriage, the arrangement was carried out. There were two co-heiresses of the patentee. Mrs. Arbuckle, the defendant's wife, conveyed to

her sister the west half of the south half. Mrs. Patterson, the sister, conveyed to Mrs. Arbuckle the east half of the south half. Each of them then on the same day conveyed to one Charles Masson, and Mr. Masson conveyed the east half to the defendant, and the west half to Martin Patterson, the husband of Mrs. Patterson. These several deeds were recorded on the 4th October, 1867. The deed under which the plaintiff claims was not executed until the 2nd December, 1867, and was recorded on the 9th December, 1867. There was no written agreement between the defendant and his wife whereby she agreed to convey this land to him in consideration of marriage.

In *Warden v. Jones*, 2 DeG. & J. 76, the Lord Chancellor Cranworth in giving judgment says, at p. 83: "The Statute of Frauds provides, that 'No action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith.'" Here there was no such agreement, and therefore this settlement was voluntary, and if voluntary, then according to the authorities it is void against creditors under 13 Eliz. ch. 5. On behalf of the wife an attempt has been made to support the settlement on the ground of a parol promise made before the marriage, and for the purpose of the agreement I will assume a parol promise to be proved, if that were a question respecting which I could enter upon an inquiry. The law has, however, wisely forbidden this."

That was a case in which the verbal agreement had been carried out, and the settlement made in pursuance thereof was set aside.

The law, as laid down in this case, was recognized and approved in the case of *Trowell v. Shenton*, L. R. 8 Ch. D. 318.

I am, therefore, of opinion that the conveyance under which the defendant claims was voluntary, and in consequence he cannot claim priority over the plaintiff under the Registry Law.

The reservation made at the trial by the learned Judge, remains to be considered: "If the Court should be of opinion that the plaintiff is entitled to recover, then it is understood it will be for the Court to say whether the defendant is entitled to a lien for his improvements. If entitled, then the amount is to be determined by a reference to the Deputy Clerk of the Crown or Master in Chancery, or to such officer as the Court may direct."

By R. S. O. ch. 95, sec. 4: "In every case in which any person makes lasting improvements on any land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of such land is enhanced by such improvements."

We entertain no doubt, from the evidence in this case, that at the time when the defendant made the improvements on the land he did so under the belief the land was his own, and consequently he is entitled to the relief pointed out by the statute; and we direct a reference as to the value to be made to William M. Matheson, Master in Chancery of the county of Carleton, as was arranged at the trial.

This rule will, therefore, be made absolute to enter a verdict for the plaintiff, but no execution to issue until the value of the improvements has been ascertained and the amount paid.

WILSON, C. J.—I agree in the judgment just delivered by my brother Galt. But I wish to guard myself against being supposed to express any positive opinion upon section 62 of the Registry Act of 1865, 29 Vic. ch. 24, as to its being applicable to cases in which the patents had issued before the passing of that Act.

The 13 & 14 Vic. ch. 63, sec. 3, required only those instruments which were within the Registry Acts, which were executed after the 1st of January, 1851, to be registered. The Consol Stat. U. C. ch. 89, sec. 53, continued that enactment. But the Act of 1865, sec. 62, altered it by enacting as

follows: "After any grant from the Crown of lands in Upper Canada and letters patent issued therefor, every instrument affecting the lands or any part thereof comprised in such grant shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such instrument is registered in the manner herein directed before the registering of the instrument under which such subsequent purchaser or mortgagee may claim."

In fact no one who has owned land for fifty years, who has not registered, and against whom a purchaser for value has first registered without actual notice either of possession or of the prior deed, can ever defend the land by paper title, but must defend it by length of possession only.

That may be the law, but I do not at present desire to be bound to say that it is so.

I agree, however, on the other parts of the case, that the verdict should be entered for the plaintiff.

Rule accordingly.

TUFFTS V. MOTTASHED.

Goods—Property passing—Special contract—Replevin.

T., the plaintiff, delivered certain articles to one C. under a special contract contained in four notes made by C. in the following form: "For value received, November 1st, 1877, after date, we promise to pay to the order of T. \$81.67. The consideration of this and the other notes is one Artic Apparatus," &c, "which we have received of said T. Nevertheless, it is understood and agreed between us and T., that the title to the above mentioned property does not pass to us, and that until all such notes are paid the title to the aforesaid property shall remain in T., who shall have the right in case of non-payment at maturity, of either of said notes, without process of law, to enter and re-take, and may re-enter and re-take immediate possession of the said property wherever it may be, and resume the same," &c. C., without payment of the notes, sold and delivered possession of the said articles to defendant, who was then unaware of the plaintiff having any claim on them, but on subsequently discovering it, negotiated for a new bargain with the plaintiff, which was not made. There was no demand and refusal of the articles. The plaintiff brought replevin, to which defendant pleaded *non cepit*, and that the goods were defendant's

Held, that the defendant was entitled to succeed on the first issue, for that the goods came lawfully into his possession, so that without a demand and refusal trespass or trover, and therefore replevin, would not lie; but that the plaintiff was entitled to succeed on the second issue, as under the terms of the notes the property in the goods continued in him.

REPLEVIN.

Declaration: For that the defendant, in a certain shop on the north side of Bridge Street, in the city of Belleville, took one arctic soda apparatus despatch, with two ten gallon copper fountains, and six number two tumbler holders, and one marble slab, and unjustly detained the same.

Pleas: 1. That the defendant did not take the goods.

2. That the goods were the goods of the defendant, and not of the plaintiff.

Issue.

The cause was tried before Armour, J., without a jury, at Belleville, at the Fall Assizes of 1878.

The evidence for the plaintiff was as follows:—

The evidence of *Wm. P. Niles*, taken under commission, was:—The plaintiff resides and carries on business at Boston. He is a soda water apparatus manufacturer. I

have been an agent of his for disposing of these articles for about six years. My powers as agent are unlimited. It is a distinct understanding with our customers that we don't sell an article, we only furnish an apparatus, unless the cash is paid down. The plaintiff manufactured the articles replevied in this cause. They were consigned to me at Belleville, and received by me as plaintiff's agent. They were brought here for Mr. Condon. He signed the exhibits A, B, C, D, and I think two others, which I believe he paid. These contracts contain the conditions on which the articles were furnished. [The form of these contracts is given in the judgment.] The articles were taken to Condon's store after I paid duties. He accepted the goods on the contracts before mentioned. Of the five unpaid notes or contracts all were due but one when the goods were replevied; the whole price was \$590. Condon had the articles till he sold to Mottashed. After the sale I had a conversation with the defendant. He wanted to assume the claim the plaintiff had on the goods; he wanted to make a new contract, making his payments monthly, but for a smaller amount than Condon was paying. The articles were then in a store in the defendant's possession, and in which he was carrying on business. The apparatus was there ready for use. It was not the season to use it. Condon had left town. I told the defendant I thought I might be able to arrange it for him; but I did not agree to do so. No new contract was made. I shewed the defendant blanks similar to the ones Condon had signed. I claimed the goods from the defendant as the plaintiff's goods, and he wanted to make a new contract. Defendant said he had paid Condon so much for the store fixtures and everything just as they were, including these articles, but he understood the plaintiff had a claim on the soda water apparatus and fixtures, as they were then. These goods were the property of the plaintiff, when he replevied. There was unpaid then \$326.66. Articles at time of replevy had depreciated 33 or 40 per cent., on account of the change of styles. The value of the goods at the time of the replevy

was \$375, to the best of my opinion. I know defendant failed in business.

Cross-examination.—The apparatus was delivered to Condon before he signed the notes. It was delivered to him on a written and printed contract signed by him. I don't think he paid \$100 before the contract was signed. I do not say that the defendant said he knew the plaintiff had a claim on the apparatus when he bought from Condon. The defendant said that Condon did not say anything about it at first, but he, the defendant, found it out, and sent me a telegram. The defendant wanted to assume the balance due and make a new contract on easier terms. The defendant was in possession of the goods when the writ of replevin issued; he was out a short time after. I found the defendant in possession when I got his telegram, and he was in possession from the third of January, 1878, up to the time the writ issued.

John Taylor said :—I am deputy sheriff. I executed the writ of replevin, on 20th April, 1878. I found the property on Bridge Street, in a place that had been occupied by Condon as his place of business. I did not know the defendant till he was pointed out to me. I think Mr. Maybee had the place seized for rent. Mr. Maybee, I think, let me in. He had the place locked, and he let me in.

I suppose I took the property out of the custody of Mottashed. I did not see him there. I found him after at the Dafoe House. He was not in the place when I took the apparatus. Maybee had the key of the place, and let me in.

Defence.

Peter Maybee said :—I know the property seized. At the time it was taken by the sheriff it was in my possession, and had been so for about four days. I had the key of the shop. No one else had any possession or control over it. I took it from Mottashed, put him out and locked the door. Before the sheriff took possession, the agent, Mr. Niles, came to me and said that he owned the property in question, but

I took no notice of him. Mr. Taylor, the sheriff, when he came, said that if I did not give him the key he would break the door. Then I let him in.

Cross-examination.—Mottashed gave me permission. I had several warrants. I had tax warrants, and one for rent. I was in possession under distress for rent and for taxes. Mottashed was in possession when I went there.

The learned Judge entered a formal verdict for the plaintiff, and \$5.00 damages, leaving the questions raised to be argued on a rule.

In Michaelmas term, November 21, 1878, *G. D. Dickson* obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside, and a verdict entered for the defendant, on the following grounds:—1. That the verdict is contrary to law and evidence. 2. That the writ was taken out against the defendant, and the goods were taken from the lawful possession of a third person, who held them for a lawful distress. 3. That the goods replevied were sold and delivered by the plaintiff to one Condon, and the property therein passed to Condon, and the conditional notes taken from Condon, under which the plaintiff claims, are void as against the defendant, there being no bill of sale or chattel mortgage given by Condon. 4. That there was no conversion by the defendant shewn, and replevin will not lie against him, and there was no demand or refusal proved. 5. The plaintiff's notes do not cover the apparatus, slab and tumbler-holders claimed.

During the same term, November 27, 1878, *J. A. Dougall* shewed cause. The plaintiff claims the goods because he delivered them upon condition that he should not lose his property in them until they were fully paid for. Such a transaction is one which does not require to be filed as a bill of sale or chattel mortgage: *Mason v. Bickle*, 2 App. 291; *Nordheimer v. Robinson*, 2 App. 305. There was no necessity to make a demand for the goods, because by the sale of them by Condon he was guilty of a conversion: *Walker v. Hyman*, 1 App. 345.

Burdett, contra. Such a transaction as the one between the plaintiff and Condon is void as against purchasers and creditors. The sale or mortgage, or whatever it was, should have been filed to preserve the plaintiff's claim upon the goods. The defendant acquired a good title to them from Condon. If the plaintiff could recover the goods he should have made a demand upon the defendant for the goods, and there should have been a refusal by the defendant to deliver them up. No such demand was made, and there was no refusal of any kind by the defendant. The sale by Condon to the defendant was not of itself a conversion: *Great Western R. W. Co. v. McEwan*, 28 U. C. R. 528; *Carveth v. Greenwood*, 3 P. R. 175.

March 7, 1879. WILSON, C. J.—The first question is, has the issue on *non cepit* been proved. The facts are, according to the plaintiff's case: that he delivered the goods in question under a special contract to one Condon, that on Condon paying for the goods they were to be his goods, but until payment for them the goods were to remain the property of the plaintiff. Condon sold the goods before he had paid for them to the defendant. The defendant did not know when he so bought that the plaintiff had any claim upon the goods: but he found it out soon after buying them, and then he offered to make a new bargain with the plaintiff for the goods, but no bargain was made. No demand was made upon the defendant for the goods, nor did he refuse to deliver them to the plaintiff at any time.

In a case like this, not a distress for rent, the owner of the goods who can maintain trespass or trover may bring an action of replevin for the goods, under our statute.

The defendant was guilty of no actual wrong in buying the articles from Condon. He was entitled to have a demand made for them before the action was brought. He had the right too to buy Condon's interest in the goods, and it is not clear, as against the plaintiff, he claimed more, because he tried to arrange with the plaintiff for the pur-

chase of the plaintiff's interest in them, and he was led to believe by the plaintiff's agent, that his proposal might be agreed to, and he was never informed to the contrary, and at no time did he refuse to give up the goods.

The case of *Mennie v. Blake*, 6 E. & B. 842, shews the defendant's purchase was not a wrongful act, to authorize the goods being replevied from him at the common law.

The question is not raised in any form that the goods were not taken from the defendant's possession, nor from any one who held the possession for him. They were taken from a bailiff who had a warrant against them from taxes, and also a warrant against them for rent, and a seizure neither from the defendant in the writ, nor from one who holds for the defendant, does not come within the statute.

I mention this merely to say we cannot entertain that question upon these pleadings. Whether the motion can be raised by pleading is of no consequence now: *Anderson v. McEwan*, 8 C. P. 532, 535; *Carveth v. Greenwood*, 3 P. R. 175.

For the want of a demand and refusal the plaintiff must fail on the first issue. That will not entitle the defendant to a return of them.

The second issue is the one which is really important, and which has been chiefly contested. A copy of one of the instruments on which it arises is as follows:

"BELLEVILLE, Ont., April 1st, 1877.

"\$81.67

"For value received, November 1, 1877, after date, we promise to pay to the order of James W. Tuffts, eighty-one 67-100 dollars. The consideration of this note and other notes is one arctic apparatus, \$84 (10,3 dispatch,) 2-10 gal. cop. founts, which we have received of said James W. Tuffts. Nevertheless it is understood and agreed between us and said James W. Tuffts, that the title to the above mentioned property does not pass to us, and that until all said notes are paid the title to the aforesaid property shall remain in the said James W. Tuffts, who shall have the right, in case of non-payment at maturity of either of said notes, without process of law, to enter and

retake, and may enter and retake immediate possession of the said property wherever it may be, and remove the same.

"Payable at the Bank of Montreal here. Due November 1, 1877.

(Signed,) "E. CONDON."

The case of *Walker et al. v. Hyman*, 1 App. 345, cited by Mr. Dougall, is expressly in point for the plaintiff. There the plaintiff delivered an iron safe to one Hergert, and at his request painted his name upon it. The price was \$170, for which he gave two promissory notes at five and six months. There were terms in Hergert's order for the safe to the like effect which are in the notes in this case. Hergert sold the safe to Hyman, the defendant, who paid him for it, after having searched for encumbrances in the office of the County Court, where no charges were filed; and who bought believing Hergert had a good title to the property. That Court held the plaintiff was entitled to maintain an action of trover against Hyman, the purchaser, for a conversion of the safe.—Patterson, J., dissenting.

Burton, J. A., who gave the judgment in which Moss, J. A., and Galt, J., concurred, decided at p. 350, that "by the terms of the contract, no property was to pass to Hergert until full payment of the price agreed on, and he could confer upon a third person no better title than he himself had, unless the plaintiffs have by their own conduct estopped themselves from setting up their own right to defeat the purchaser, the defendant. What is relied upon for the purpose is, that in the order for the safe, which is the subject of the suit, Hergert requested the plaintiffs to have his name painted upon it, and, although the property was not to pass until full payment of the price, it was delivered to Hergert with his name painted upon it as if he was the absolute owner."

The majority of the Court held that the defendant was not deceived by Hergert's name being upon the safe, and that he had no knowledge of the plaintiffs having themselves painted Hergert's name upon it; but, if he had

known such fact, the plaintiffs would have been estopped from setting up their title against him.

Patterson, J.A., at p. 358, was of opinion that the plaintiffs, by painting Hergert's name upon the safe, declared in effect, "this safe belongs to Hergert," and that the bargain between the plaintiffs and Hergert was, by Hergert's order: "Sell me a safe; the property to be yours until I pay for it, but in the meantime it is to appear to be mine. It is really to remain yours, but every one who sees it is to be told that it is mine."

He also added: "The plaintiffs agree to this, and act upon it by painting on the name and delivering the safe to Hergert; and when the defendant deals with Hergert, the state of things apparent to him is just what the bargain was that it should be, and what the plaintiffs had actively and intentionally assisted in creating."

Of course the case ought to govern our decision here, leaving the defendant to contest it further if he should be so advised.

The other cases cited in the Court of Appeal do not so closely apply, for the person in each of such cases who got the article was not the purchaser, but was to have the right of purchasing when he paid the price agreed upon, and in the meantime he was to have the article only on hire, at a certain monthly payment, the property remaining in the plaintiff.

If in place of a soda water apparatus, which is not an article held for sale by a confectioner in the course of his business, but for use in that business, goods to traffic with by making sale of them had been furnished to Condon, and he had given a bill of sale of them, I should be of opinion that the plaintiff by the power he had conferred upon Condon to deal with and sell the goods as his own, would be deemed to have held him out to the public as the owner of them, and would be bound by any act which Condon as an owner might have done; or, even if the plaintiff knew Condon was claiming the soda water apparatus as his own, and the plaintiff suffered it, he would be equally bound by Condon's acts.

But I am not able to say that a soda water apparatus in the possession of one is necessarily to be assumed to be his property, and that any one may buy from such person and divest the true owner of his title to it. Such articles are frequently lent or hired by the person using them, and whoever deals with the user of it must take caution for the title he gets or bargains for.

I cannot say this is quite a safe mode of dealing, so far as the general creditors of the person having in his possession and using such an article, or any article of property, are concerned.

It seems very like an evasion of and a fraud upon our statutes relating to bills of sales and chattel mortgages.

The transaction was and is in substance a sale, but it is to have none of the qualities or properties of a sale, excepting the most important of them, the one which of all others the most imports ownership, that of possession, and therefore, of all others, the most likely to impose upon others the idea that the possessor was also the proprietor.

I presume the one who pays a larger part of the price of the article must be entitled to an account from the person asserting ownership, and who retakes the article as such owner. In case of loss by fire, robbery, or any other means not attributable to the one in possession, upon whom would the loss fall? If no property passed it would, I presume, fall on the owner, who could not require the other to pay the price. There may be questions affecting the rights of parties to property dealt with in this manner which have not been considered or settled yet.

There are, however, so many instances of possession without title most honestly held, and intended by both parties to be honestly held, without raising the idea or expectation of any one that ownership is to be implied, that the subject if interfered with would require to be most cautiously handled.

A person may easily lend his watch, or his horse, to a friend, or a piano, or furniture, to a child or relative, without losing his property in these articles on the claim

of any one, unless some statute expressly declares he shall lose it in certain cases, as the order and disposition clauses in the English Bankruptcy Act provide. So a watch-maker or other tradesman has the watch or other articles of the owner to repair, without risk of loss of property to the owner from the creditors of these tradesmen ; and one may lawfully hire his chattels out to another without endangering his title to them.

Many other instances might be put, for persons may make whatever contracts they please, whether they are wise or foolish bargains, and the law should and does assume to give effect to them.

I think, upon the whole, the plaintiff is entitled to a verdict on the second issue, but not for the six number two tumbler holders, and the marble slab, which are not mentioned in the notes which Condon signed.

The rule will therefore be, that the verdict be entered for the defendant on the first issue, and for the plaintiff on the second issue, as to the arctic soda apparatus and the two ten gallon copper fountains.

Rule accordingly.

THE CONSOLIDATED BANK OF CANADA V. HENDERSON.

Husband and wife—Note made by wife to husband—Liability—Judgment on demurrer.

A married woman married after the 2nd March, 1872, possessed of separate estate, and contracting in reference thereto, made a promissory note to her husband for his accommodation, which the husband endorsed for value to the plaintiffs.

Held, that she was liable upon such note, but, following *Lawson v. Laidlaw*, 3 App. 77, that the judgment must be a qualified one against her separate estate.

Judgment should not be given against a demurrer by a defendant by reason of his failure to appear in support of it. The judgment must either be against the defendant by default, or it must be argued, and judgment given on the merits.

THIS was an action on two promissory notes, made by the defendant, a married woman, dated 25th of April, 1878, payable to the order of A. Henderson, (her husband), one of them at one month, and the other of them at two months after date, each in the sum of \$410, which notes were endorsed by the husband to the plaintiffs for value.

The only pleas necessary to refer to are the eighth, ninth and tenth.

The eighth plea was : that the defendant, at the time of making the notes, was the wife of the said A. Henderson.

Ninth plea: that being the wife of A. Henderson, she made the notes for his accommodation, and without any consideration.

Tenth plea: that being the wife of A. Henderson she did not make the notes in respect of any employment or business in which she was engaged on her own behalf.

Replications.

1. Issue on all the pleas.

2. To the eighth plea, on equitable grounds, that at the time of making and endorsing the notes the defendant was, and still continues to be, possessed of real and personal property, her sole and separate estate and property: that the notes were made to enable the husband of the defendant to sell, dispose of, and endorse the same for valuable consideration to the plaintiffs, and the same were accordingly with the defendant's knowledge and consent so sold

and endorsed to the plaintiffs, who became the holders thereof for valuable consideration, and upon the faith of the defendant so having such separate estate and property.

3. Replication to ninth plea, substantially similar to the second replication to the eighth plea.

4. Replication, also on equitable grounds, to the eighth, ninth, and tenth pleas, alleging that the defendant was married to her said husband after and not before the 2nd day of March, 1872; and that at the time of the making of the promissory notes in those pleas and the declaration mentioned, and also at the time of the endorsment of such promissory notes to the plaintiffs, as in the declaration mentioned, the defendant was possessed of real property and of personal property, not received by her during her coverture, and that such real and personal estate was not, nor was there any part thereof, affected by the trusts of any settlement: that these notes were made by the defendant to her said husband to enable him to discount the same to whom he could for valuable consideration for the benefit of the defendant and her husband, and on the faith of her said real and personal estate, all which he thereupon accordingly did with the plaintiffs, and they so became and were and are the holders thereof for valuable consideration.

Issue on second and third replications.

Demurrer to fourth replication. Joinder.

The demurrer book was put in, upon which was endorsed by Gwynne, J.: "No one appearing in support of demurrer, judgment is given against it without argument. November 15th."

The cause was tried before Cameron, J., without a jury, at Hamilton, at the Winter Assizes of 1878.

The learned Judge, with the consent of the counsel, made the following entry on his notes:—

"Mr. MacKelcan consents to a verdict of \$700 being taken, subject to the following objections: that the note, being made to the husband, is void; but, apart from this objection, he admits all circumstances exist to make the defendant liable."

The verdict was entered accordingly.

In this term, February 6, 1879, *MacKelcan*, Q. C., obtained a rule, calling on the plaintiffs to shew cause why the verdict for them should not be set aside, and a verdict entered for the defendant, upon the ground that the promissory notes sued on were void instruments, by reason of their being made by a wife in favour of her husband, and of there being an incapacity to contract, which made the instruments mere waste paper.

In the same term, February 14, 1879, *R. Martin*, Q. C., shewed cause. By consent of the parties the Court are to be considered as rehearing the formal judgment given on the demurrer as well as hearing the argument upon the rule. Where there is a separate estate of the wife she can contract so as to bind it with her husband. In *Field v. Sowle*, 4 Russ. 112, the wife joined in a promissory note with her husband for £130 to the plaintiff, who had advanced money to her husband. The Master of the Rolls held the signature by her of the note was sufficient evidence *primâ facie* to charge the wife. The decree was made for satisfaction out of the rents and profits settled to her separate use. *Hewison v. Negus*, 16 Beav. 594, 17 Jur. 445, in appeal, 22 L. J. Ch. 655-7, 17 Jur. 567, shews a married woman may contract with her husband. They made a post nuptial settlement of her estate, which was held to be upon a valuable consideration, as the husband gave up his estate by curtesy and subjected himself to the trusts of the settlement. See also *Teasdale v. Braithwaite*, L. R. 4 Ch. D. 85, which was a case like the preceding one, and *Re Foster and Lister*, L. R. 6 Ch. D. 87. In *Morell v. Cowan*, L. R. 6 Ch. D. 166, in appeal L. R. 7 Ch. D. 151, the wife gave a guarantee to a tradesman, that in consideration of a tradesman supplying her husband with goods, she would be answerable to the extent of £500, and it was held to be a charge upon her separate estate. *Davies v. Jenkins*, L. R. 6 Ch. D. 728, was a case where a married woman since the Married Woman's Property Act, 1870, joined her husband in signing a joint and several promissory note for money lent to him: *Held*, her separate estate was liable, and that her trustees need not be parties

to the action. *Kerr v. Stripp*, 40 U. C. R. 125, shews a married woman who gave a note jointly with her husband and another for a debt of her husband, was liable on it as one of the makers. *Frazee v. McFarland*, 43 U. C. R. 281, was a case where the wife of one of two makers of a promissory note endorsed it to the plaintiffs. She pleaded her marriage: that she endorsed for the accommodation of the makers of the note without any consideration, and that she did not endorse in respect of any employment or business in which she was engaged on her own behalf. The plaintiffs replied that the woman was at the time possessed of separate estate acquired after the Act of 1872, and that such estate was not affected by the trusts of any settlement, and that her endorsement was her separate contract and made by her respecting her separate estate, upon which issue the plaintiff had a verdict, and the Court sustained it. In *Re Miller*, 1 App. 393, it was held a married woman who had lent her husband certain shares in a building society, which were her own separate property, could prove as a creditor upon her estate.

MacKelcan, Q. C., contra. In no case has it yet been decided that a note made by a married woman to her husband can be enforced. Moreover, the note here was given merely for the accommodation of the husband. In *Darling v. Rice*, 1 App. 43, Burton, J. A., expressly lays it down that an accommodation note is not a contract which a married woman is authorized to enter into under the Married Woman's Acts; and Draper, C. J. A., expresses a doubt to the same intent. In *Thompson v. Dickson*, 28 C. P. 225, the Court of Common Pleas, in deciding as to whether the property then in question was separate estate or not, expressly guard themselves against deciding as to the validity of a note made by a married woman payable to her husband. Hagarty, C. J., stated that he desired to express no opinion on the point, while Gwynne, J., said that he desired to guard himself from being supposed to countenance the idea that a promissory note made by a wife to her husband, and void as between them, should obtain validity by being endorsed

by the husband to a third person. See also *Dixie v. Worthy*, 11 U. C. R. 328; *McIver v. Denison*, 18 U. C. R. 619; *Lawson v. Laidlaw*, 3 App. 77. The result of the authorities is, that there is no liability.

March 7, 1879. WILSON, C. J.—The cases which have been referred to by Mr. Martin as decided in England and in this Province, shew the plaintiffs are entitled to a verdict against the defendant, who is a married woman, and to judgment on the demurrer also.

In suing a married woman on her separate debt, engagement, contract, or tort, it has never been considered necessary, and perhaps it is not, to aver in the declaration, or to suggest on the record, that she has separate property, or more properly, *property of her own*. The plaintiffs are entitled to their judgment against her if they recover a verdict. She is in such case liable as if she were a *feme sole*, or as if she were unmarried.

The English statutes on the same subject are not in the least like ours.

If the married woman is liable as if sole and unmarried, why are we to say she shall not be?

It appears to me there is much required yet before the statute can have its full and proper effect. Legislation would be the easiest way to determine it.

The English statutes on the like subject do not aid us, because they have no such provisions as we have in our Acts.

When it is desired to restrict the generality of the statute, the statute itself is sufficiently specific.

In R. S. O. ch. 125, sec. 15, a woman, married since the 4th of May, 1859, having separate property, not settled by *ante nuptial* contract, is made liable upon her separate debts or contracts, incurred or made *before* her marriage, as if she were sole and unmarried *to the extent and value of such separate property*.

So by section 16, a man who has married since the 4th of May, 1859, and who takes any interest in his wife's

separate estate under any contract or settlement on marriage, shall be liable upon the debts or contracts of his wife *before marriage, to the extent or value of such interest only, and no more.*

So by section 17: A husband, married since the 2nd March, 1872, shall not be liable for the debts of his wife contracted *before marriage*, but the wife shall be liable to be sued therefor, *and any property belonging to her shall be liable to satisfy such debts as if she had continued unmarried.*

But there is no such qualifying statement that the wife shall be liable *only out of her separate estate, or to the extent of it*, in case of her business or personal contracts made after marriage. See sections 18, 19, 20.

Then again when "separate debts, engagements, contracts, or torts," are mentioned in section 20, and for which she is to be liable *as if she were unmarried*, is it contended that a married woman who commits a separate tort by knocking some one down, or breaking into another's house, is not to be sued or proceeded against separately from her husband, because she has no separate property? Is the husband to be punished along with her when she has no separate estate, and to be exempted when she has? If so, that is reversing the general provisions of the Act which make the husband liable only when he derives a benefit from her property.

If the husband is not to be sued with his wife when she commits a separate tort, whether she has separate property or not, then she must be sued alone in such a case; and it comes round to the same question—is she only to be sued for such tort when she has separate property?

In my opinion that is not the meaning of the language of the Act. The principal purpose of our legislation was and is to establish the individuality of the married woman in contemplation of law.

It was intended that she should be personally liable upon all her own separate contracts, and for all her own separate contracts, and the statute, in my opinion, says so. The

joinder of separate torts with separate debts, engagements, and contracts, it appears to me, makes it clear that the one rule should apply in all these cases, and inasmuch as a married woman who is a separate tort-feasor is, in my opinion, liable alone for her wrong, without regard to her having or not having separate property, and without regard to the nature of the proceedings, personal or otherwise, which may be taken in any such action she is equally and in like manner liable for all her separate personal debts and engagements.

In England it has been held under the Imperial Act of 1870, sec. 62, which is similar to sec. 17, of the R. S. O. ch. 125, that a married woman cannot be made a bankrupt for a debt contracted before marriage. That would be so here also under the like section. But the wording of that section is very different from the following sections, as I have already shewn.

In my opinion the plaintiffs should take a general judgment, but according to the case of *Lawson v. Laidlaw*, 3 App. 77, the plaintiff must take a qualified judgment against the personal estate which she now has. And if she make away with it, I suppose it follows that she cannot be imprisoned like other ordinary debtors.

I may add that giving a judgment against a defendant on demurrer who does not appear to support it is not properly the practice.

If it were a plaintiff he might be nonsuited for not appearing, because he has a day in Court for that purpose: *Nesbit v. Rishton*, 11 A. & E. 244. As it is a defendant the judgment should either be against him by default, or the Court must hear the argument and decide it; but a judgment cannot be given either for or against the demurrer without its being heard, not even by consent of parties, for the Court is not to pronounce bad law upon the consent of parties: *Nicholl v. Allen*, 1 B. & S. 934, 938, 939.

I am of opinion, as before stated, that the plaintiff is entitled to judgment on the demurrer, and also to have the rule discharged.

GALT, J.—The admission made at the trial, as I understand it, includes the admission that the wife has separate property, and also that the contract was made in reference to that property.

By the 20th sec. of ch. 125 R. S. O., “any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried.”

The eighth, ninth, and tenth pleas set up as a defence that she was at the time of making the said promissory note a married woman, and that she made the notes for the accommodation of her husband, and without consideration.

The fourth replication is as follows: “And the plaintiffs as to the eighth, ninth, and tenth pleas, for a replication on equitable grounds, say the defendant was married to her said husband after and not before the 2nd day of March, 1872, and that at the time of the making of the promissory notes in those pleas, and in the declaration mentioned, and also at the time of the endorsement of such promissory notes to the plaintiffs, as in the declaration mentioned, the defendant was possessed of real property and of personal property not received by her during her coverture, and that such real and personal estate were not, nor was there any part thereof affected by the trusts of any settlement: that these notes were made by the defendant to her said husband to enable him to discount the same to whom he could for valuable consideration, for the benefit of the defendant and her husband, and on the faith of her real and personal estate, all which he thereupon accordingly did with the plaintiffs, and they so became and were, and are the holders thereof for valuable consideration.”

The truth of this replication is admitted by what took place at the trial, and, unless I am prepared to hold that although a wife, under these circumstances, would be liable as a joint maker with her husband, as has been decided in the Court of Appeal in the case of *Lawson v. Laidlaw*, 3 App. 77, yet she is not liable because she is the sole maker and the husband the endorser, the law, as laid down in that case, is decisive against the defendant.

The rule must be discharged. The judgment to be limited in the manner pointed out by the Chief Justice in his judgment.

Judgment and rule accordingly.

SLY V. OTTAWA AGRICULTURAL INSURANCE COMPANY.

Insurance—Value—Misrepresentation.

No. 1, of the statutory conditions endorsed on a policy of insurance provided that, "if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect of property in regard to which the misrepresentation or omission is made." In an application for insurance on a building the plaintiff stated its estimated cash value to be \$900, and obtained an insurance for \$600. The jury found that the actual cash value was \$450, but that his estimate was made in good faith, and that he had not been guilty of any fraud or misrepresentation.

Held, that under the above condition, it was immaterial whether a representation of any fact material to be made known to the defendants to enable them to judge of the risk, was falsely (*i. e.*, untrue to the knowledge of the person in making it) or fraudulently made, so long as it was in fact untrue; and that the question of value being such a material fact, and the representation relating thereto being untrue, the policy was avoided.

THIS was an action on a policy of insurance for \$600 on a wooden building, averring a total loss by fire.

At the trial several alterations were made in the pleadings.

The declaration, as originally framed, stated that the conditions to which the policy was subject were the usual and ordinary statutory conditions, varied as follows: It then set forth the variations. These were struck out at the trial, because they were not stated to be variations in

the manner expressly required by the statute. All the pleas setting up these variations, and relying on them as affording grounds of defence, were also struck out.

The fourth plea, as amended at the trial, read as follows: "And for a fourth plea to the said declaration, the defendants say, that the first of the conditions in said policy of insurance, known as statutory conditions, is in the words following, that is to say: 'If any person or persons shall insure his, her, or their buildings or goods, and shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.' And the defendants say that in and by the said application for insurance on which the said alleged policy was based and granted the plaintiff represented that the building alleged to have been insured under the said policy of insurance and had been destroyed by fire, had only been built for ten years, and that it was worth as cash value at the time of the said application being made, the sum of \$1,350, while the defendants allege, as the facts are, that the said building had, at the time the said application was made, been built for eighteen years, and was not worth as cash value more than \$200, whereby and by reason of each of which misrepresentations by the plaintiff, under the said condition, the said policy always was and now is null and void, and of no effect in law or equity."

As the judgment turns upon this plea only, it is unnecessary to give any of the others.

The cause was tried before Armour, J., and a jury, at Brockville, at the Fall Assizes of 1878.

The evidence established that in February, 1876, the plaintiff bought, not only all the buildings insured, but all the land on which they were situated, for the sum of \$425.

The plaintiff, in his application, stated its estimated cash

value at \$900, and obtained insurance thereon to the extent of \$600.

The learned Judge submitted the following questions to the jury:

What was the actual cash value of the building destroyed at the time it was insured? Answer. \$450.

What was the actual cash value of the building destroyed at the time it was destroyed? Answer. \$450.

Did the plaintiff fraudulently represent the value of the building to be \$900, or was his estimate of its value at that amount made in good faith? Answer. It was made in good faith.

Did the plaintiff fraudulently represent the age of the said building to be ten years? Answer. He did not.

Was the plaintiff guilty of any fraud or misrepresentation in procuring the insurance to be effected? Answer. No.

On these answers a verdict was entered for the plaintiff with \$450 damages.

In Michaelmas term, November 22, 1878, *J. K. Kerr*, Q. C., obtained a rule *nisi* to enter a nonsuit on the leave reserved, or a verdict for the defendants.

In this term, February 12, 1879, *E. H. Smythe*, (of Kingston), shewed cause. In the judgment granting the new trial in this case, reported in 29 C. P. 28, the Court were of opinion that there was an overvaluation, but that it was not wilful; and being dissatisfied with the finding of the jury, they granted the new trial. At the last trial the jury found the value to be \$450, and also that the plaintiff did not fraudulently represent the value of the building to be \$900, but that his estimate of the value was made in good faith; and the evidence sustains this finding. It appeared that the defendants' agent, as he was required to do, personally inspected the premises and approved of the valuation of \$900, so as to authorize an insurance of two-thirds of the value, or \$600. There was clearly, therefore, no fraudulent overvaluation: *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *Naughton v. Ottawa*

Agricultural Ins. Co., 43 U. C. R. 121; *May* on Insurance, 167; *Clarke* on Insurance, 19. In *Park v. Phoenix Ins. Co.*, 19 U. C. R. 110, it was held that the loss, though over-estimated, being equal to the amount insured, and there being circumstances to explain the over-charge, the jury were warranted in finding for the plaintiff. The defendants should not now be allowed to set up the defence of warranty: *Gugisburg v. Waterloo Ins. Co.*, 24 Grant 350. The question of value is not one of warranty, for it is merely a matter of opinion: *Riach v. Niagara District Mutual Ins. Co.*, 21 C. P. 464; *Williamson v. Commercial Union Ins. Co.*, 26 C. P. 591. The effect of the application is not to constitute a warranty. A warranty is synonymous with condition, and must be part of the policy itself: *Behn v. Burness*, 3 B. & S. 751; *Moore v. Connecticut Mutual Ins. Co.*, 41 U. C. R. 497; *Ulrich v. National Ins. Co.*, 42 U. C. R. 161. The question of warranty is raised by the variation conditions, and these are inoperative as not in accordance with the statute. The same argument applies as to the age of the building.

J. K. Kerr, Q. C., contra. The plaintiff made the variation conditions part of his declaration, which made the questions of value and age of warranties, and the defendants pleaded to this declaration as so framed. At the trial the learned Judge struck out the variation conditions from the declaration as not being in accordance with the statute, but would not allow the defendants to amend their pleadings so as to set up the warranties as a defence. This certainly should have been allowed to the defendants, and it should be now granted. Even if the variation conditions cannot be looked at as conditions, they may be looked at to shew the nature of the contract the defendants were entering into. It is quite competent for the parties to stipulate as to the matters collateral to the statutory conditions, and they can therefore shew that the contract depended on the truth of the representations as to the value and age of the building. There was clearly a warranty. But even if there was no warranty there was a fraudulent misrepresentation: *Benson v. Ottawa Agricul-*

tural Ins. Co., 42 U. C. R. 282; *Williamson v. Commercial Union Ins. Co.*, 25 C. P. 453, 26 C. P. 591. The defendants can set up the defence as to value and age under the first condition. Under that condition it is immaterial whether the answers were falsely or fraudulently made or not, but the question is, whether they were material to the risk, and it cannot be disputed that the question of value and age are most material to the risk: *Riach v. Niagara District Mutual Ins. Co.*, 21 C. P. 464; *Kerr v. Hastings Mutual Ins. Co.*, 41 U. C. R. 226; *Laidlaw v. Provincial Ins. Co.*, 13 Grant 377.

March 7, 1879. GALT, J.—This case had been tried before Morrison, J., at the Spring Assizes, when a verdict was rendered for the plaintiff for \$300. A new trial was granted, as reported in 29 C. P. 28. It will be seen that we then thought the verdict very unsatisfactory, and a new trial was granted, without costs. The case was again tried before Armour, J., and the jury found a verdict for the plaintiff for \$450. The charge of the learned Judge appears to us to be unobjectionable, and certainly the defendants have no reason to complain of the manner in which the case went to the jury.

It is to be observed that the statutory condition does not turn on the question whether the erroneous description or misrepresentation was falsely or fraudulently made, but simply as to whether they were material to be made known to the company in order to enable them to judge of the risk they undertake, and whether they were true.

I think there can be no doubt that a fair and reasonable statement should be made by the insured as to the value, and although I should not feel disposed to criticise very closely the actual as distinguished from the estimated value, it is manifest that the statement of value is most material in order to enable the company to judge of the risk, and it appears to me impossible to believe that the defendants would have accepted this risk if they had been informed of the value.

The actual value of the house, as found by the jury, was only \$450. The estimated cash value was \$900, and the amount insured \$600. So far as the defendants are concerned, it was a matter of indifference to them whether the statement of value was false and fraudulent, or whether it was simply untrue. The result, as far as they are concerned, was the same: they were induced by the misrepresentation to accept a risk which they would not have done if they had been correctly informed.

This distinguishes this case from *Dickson v. Equitable Assurance Co.*, 18 U. C. R. 246. That was a case of great over-value. The plea on which the case turned was, "that the policy was obtained by fraud, the plaintiff having in his application to the defendants falsely represented the present cash value to be £750, whereas the building was of much less value."

Sir J. B. Robinson, C. J., says, at p. 249: "Whether upon the facts proved here there was so plain and so material a misrepresentation made by the plaintiff as ought to avoid the policy, though not upon a point respecting which there is any warranty or condition in the policy, is a question that must be left to the jury, because they alone can draw inferences of fraud. * * We think that what the law regards as a fraudulent over-valuing required to be proved in order to support the plea."

In the plea I am now considering, there is no allegation that the representation as to value was either false or fraudulent, but that it was untrue. I understand the word "false" to mean, not only that the statement made is untrue, but that the person making it knows it to be so. The Legislature has not rendered this necessary to be proved for the protection of the insurers. What it requires is, that "if the person insuring his buildings shall cause the same to be described otherwise than as they really are to the prejudice of the company, or shall misrepresent any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect of

the property in regard to which the misrepresentation is made."

As I am of opinion that the misrepresentation (although found by the jury to be without fraud) of the value of the house was material to be made known to the company in order to enable them to judge of the risk, and that the same was untrue, the plaintiff cannot recover, and the rule should be absolute to enter a nonsuit.

WILSON, C. J., concurred.

Rule absolute.

DENMARK V. McCONAGHY ET AL.

Practice—Discharge of jury during trial—Waiver.

Where the trial of a cause begins and is entered into with or without a jury, as the case may be, it must be finished in like manner, unless by consent of parties.

In an action of trespass *quare clausum fregit*, the trial was commenced with a jury, but an objection of a technical character having been taken by defendants' counsel to the plaintiff's evidence of a title deed offered in rebuttal, the learned Judge granted an adjournment to enable him to cure the defect, discharged the jury, and afterwards resumed and finished the case without a jury. The defendants' counsel objected to the discharge of the jury, but continued to act in the case without further objection, and the plaintiff obtained a verdict.

Held, that the course pursued was unauthorized; but *Seemle*, that the defendants' counsel by proceeding with the defence, and taking his chance of a verdict, had waived the objection.

TRESPASS *quare clausum fregit*.

The plaintiff proved a paper title to the land in dispute.

The defendants claimed title by possession.

The cause was tried before Armour, J., at Belleville, at the Fall Assizes of 1878. The trial began with a jury, before

whom the evidence in chief for the plaintiff, as also evidence for the defence was given. The plaintiff thereupon proceeded to give evidence in rebuttal, and for such purpose offered as evidence of a patent from the Crown a certified copy, instead of an exemplification thereof. The defendants objected to the admission of such certified copy as evidence, whereupon the learned Judge, considering that the defendants were attempting to take advantage of a purely technical objection, discharged the jury and put the case at the foot of the list in order to enable the plaintiff to cure the defect; and on the case being subsequently resumed, continued and finished the case without a jury, and entered a verdict for the plaintiff, and assessed the damages at \$30.

It appeared that the defendants' counsel objected to the learned Judge discharging the jury and to his subsequently proceeding to continue the case without one, but notwithstanding his objection he continued to act in the case.

In Michaelmas term, November 28, 1878, *Ferguson*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict for him should not be set aside, and a nonsuit or verdict be entered for the defendants, upon several grounds specially set forth in it. The points argued were how the verdict should have been entered upon the evidence, and whether the learned Judge, after proceeding a good way with the trial by jury, could discharge the jury and proceed with the remainder of it himself without a jury, and give a verdict upon the whole case and damages against the objection of the defendants' counsel.

In this term, February 10, 1879, *Robinson*, Q. C., shewed cause. The defence was not proved. The title of the defendants by possession was not made out. As to the discharge of the jury in the manner complained of. That course has been frequently taken, and hitherto without objection. If a Judge find out, after proceeding with the case for a time with a jury, that there is in fact no question to leave to them, or that it is a case which should properly

be tried without a jury, there can be no objection to his discharging the jury and proceeding with it by himself, and so in like manner if he begin the cause without a jury he may afterwards require one: R. S. O. ch. 50, secs. 252, 258. The defendants' counsel appeared before the learned Judge while trying the case alone, and, if he had intended to rely on the objection to the discharging the jury, he should not have appeared and taken his chance of a verdict; by this course he has waived the objection, if any: *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520; *Ham v. Lasher, Ib.*, 533, note.

Ferguson, Q. C., contra. As to the merits, the defendants proved their title by possession. As to discharging the jury pending the trial without the defendants' consent, the Judge cannot change the mode of trial after the trial has once begun. The appearance of the defendants' counsel before the Judge when he was trying it alone should not be held to waive the objection. It is always a delicate matter for a counsel to put himself in antagonism to the presiding Judge, and allowance should be made by the Court for a counsel so circumstanced as the defendants' counsel was here. His original protest should be taken as continuing throughout the trial, although it was not renewed when the Judge took up the case alone, and the defendants should be allowed the benefit of it.

March 7. 1878. WILSON, C. J.—[The learned Chief Justice, after reviewing the documents and evidence, came to the conclusion that the defendants had acquired a title by possession, and therefore that upon the merits the verdict should be for the defendants. It is considered unnecessary to report this portion of the case.]

The cause was tried before Armour, J., at first with a jury, but in the progress of the cause an adjournment of the trial became necessary, and was ordered, upon which the jury were discharged, and on the day the cause was adjourned to the trial was resumed by the learned Judge without a jury, who rendered a verdict for the plaintiff, and assessed the damages at \$30.00.

As to the objection to the learned Judge discharging the jury pending the trial without the consent of the defendants' counsel, I am of opinion it was not warranted in law. If a Judge can do so to admit better evidence, as was done in this case, he may equally do so for any other cause, and at any stage of the trial. He may do so because he may think one of the parties is not acting liberally or honourably on the trial, or because the jury may not be disposed to take the same view of the case which he does, or because they propose to give a verdict which he does not approve of, or because they have not answered some question which he desired them to answer, or because they have not answered it as he thinks it should be answered.

I do not imagine that a Judge will ever act unfairly or illegally; but in the case of *Dimes v. Grand Junction Canal Co.*, 17 Jur. 73, a decree of the Lord Chancellor was set aside, because he was formally interested in the cause. That, of course, is not the case here, but it shews how jealously the acts of Judges are to be watched, when there is even a supposable bias from any cause.

When the trial begins with a jury, or without one, it must be finished in that manner, unless with the consent of parties. The Statute assumes that such shall be the course taken. "The Judge presiding at the trial may in his discretion direct that any such action shall be tried * * by a jury," or by his direction it may be tried without the intervention of a jury: R. S. O. ch. 50, sec. 255.

It might be inconvenient, and in some cases very absurd, to try a cause half way through by a jury, and the other half without a jury, or the reverse.

I am disposed to think, however, that Mr. Dougall waived the objection by appearing afterwards before the Judge alone, and proceeding with his defence without further objection.

It may be possible a Judge, after beginning a cause, with or without a jury, may change his mind and begin *de novo* in a different manner, but I am not by any means free from doubt about it, and I prefer saying that after the trial

has begun the mode of trial cannot be changed, but by consent of parties.

Upon the whole case, in my opinion, the rule should be made absolute to enter the verdict for the defendants.

Rule absolute.

BRITTON V. KNIGHT ET AL.

Lease to husband and wife—Acceptance by wife—Registry Act—Prior registration—Estate by entireties—Married Woman's Acts—Non-execution of lease—Term passing.

S. S., the owner of certain land, agreed to convey the same to his son T. S., on his paying certain moneys for S. S., and forthwith granting a life-lease thereof to S. S. and his wife. The conveyance and lease were accordingly executed, the latter, containing, amongst others, covenants to be performed by the lessees, was executed by T. S. and S. S., but not by the wife. The lease was put on registry, but not the deed, which was proved to have been destroyed. Subsequently S. S. and T. S. joined in a mortgage of the land to the plaintiff, which was registered. The plaintiff, on enquiries made by him on finding the lease on record, obtained actual notice of the deed to T. S., but did not deem it of any importance, believing the transaction to have fallen through in consequence, as he understood, of the wife's repudiation during her husband's lifetime of the lease, and the destruction of the deed. After the death of S. S. the wife asserted her right to the life lease, and held possession of the land; and on the plaintiff bringing ejectment she defended in such right.

Held, that the plaintiff could not claim by reason of the non-registration of T. S.'s deed and the registration of the plaintiff's mortgage, because as he had actual notice of such prior deed the Registry Act would not apply; but even if applicable, the plaintiff was bound by the prior registration of the life lease.

Held, also, that the Married Woman's Acts did not affect this property conveyed to husband and wife, which by law they held by entireties: that a repudiation of the lease during coverture would not be binding on the wife, but that she might still assert her right thereto after her husband's death, as she in fact did; but that no such repudiation was proved, for the evidence at the most shewed that she merely objected to T. S. getting the land, and not to the lease.

Held, also, that the non-execution by the wife of the lease containing covenants to be performed by her did not render her incapable of taking thereunder, for that notwithstanding the term passed to her.

EJECTMENT for the east quarter of lot No. 25 and lot No. 26, in the 2nd concession of the township of Storrington, formerly in the 1st concession of the township of Loughborough, containing 125 acres.

Three of the defendants defended only for lot 26. The fourth defendant did not appear at all.

The plaintiff claimed by a mortgage, made on the 4th of May, 1874, by Thomas Spooner and Simeon Spooner to the plaintiff.

The defendants, Jane Spooner, Robert Knight, and James Smith, besides denying the plaintiff's title to the said lot No. 26, asserted title in themselves to the said premises as follows:

Jane Spooner, by virtue of a life lease of the said premises from the defendant Thomas Spooner (who had not appeared) to her and one Simeon Spooner, dated 27th of April, 1872.

And Robert Knight and James Smith, by virtue of a lease from the said Jane Spooner to them, dated the 13th of March, 1878.

And for a defence on equitable grounds the defendants alleged that one Simeon Spooner, under whom the plaintiff claims, was in the year 1872 seised of the said premises in fee simple, and being so seised, he contracted and agreed with the defendant, Thomas Spooner, (who has not appeared,) to convey the said premises to him in fee, upon condition that the said Thomas Spooner should pay certain moneys for the said Simeon Spooner, and should forthwith reconvey the said premises to the said Simeon Spooner; and the defendant, Jane Spooner, who was his wife, for the term of their natural lives: that thereupon in pursuance of the said agreement, the said Simeon Spooner, by deed, dated the 27th of April, 1872, conveyed the said premises to the said Thomas Spooner in fee: that contemporaneously with the said deed, an instrument was drawn whereby the said Thomas Spooner assumed to demise and lease the said premises to the said Simeon Spooner and the defendant Jane Spooner, for the term of their natural lives, and

covenanted with the said Simeon Spooner and Jane Spooner that they should have quiet possession, and should peaceably possess the said premises during the term of their natural lives without the lawful interruption or eviction of any persons whomsoever, which said instrument was duly executed by the said Thomas Spooner and Simeon Spooner, under whom the plaintiff claims: that through ignorance and mistake the conveyancer who drew the said instrument did not therein use proper or apt words to convey at law the freehold estate thereby intended to be conveyed, notwithstanding which the said defendants shew that the said conveyance was good and effectual in equity: that the said Simeon Spooner departed this life on the 9th of May, 1877, whereupon the said Jane Spooner became solely entitled to the said premises for the term of her natural life, and by deed, dated the 13th of March, 1878, she demised the said premises to the defendants Robert Knight and James Smith, for the term of three years from the 1st of April, 1878: that the plaintiff had full knowledge and notice of the premises at the time he received the mortgage upon which he is proceeding in this action. Wherefore the defendants submit that the plaintiff is not entitled to recover the said premises as against them, and submit, also that the said Jane Spooner is entitled to have the said instrument reformed so as to make the same a valid and effectual conveyance to her at law of the said premises for the term of her natural life; and they pray, also, that the plaintiff may be enjoined from bringing any action against them to recover the said premises.

The plaintiff took issue upon each and every of the allegations in the pleas or defence on equitable grounds of the defendants Robert Knight, James Smith, and Jane Spooner.

The cause was tried before Armour, J., without a jury, at Kingston, at the Fall Assizes of 1878.

The plaintiff's title was admitted.

The defence was then entered into.

Mr. *Walker*, who drew the deed from Simeon to Thomas

and the life lease from Thomas to Simeon and Jane Spooner, and the bond from Thomas Spooner to pay certain legacies to his sister, said : "The document I drew at that time truly expressed my understanding of the arrangement. Whatever is in the document (the life lease) is right. They were all executed together. Old Spooner got the lease. was left in abeyance as far as the old lady is concerned."

Caroline Smith, a daughter of Jane Spooner, said : "My mother was at a neighbour's house, and we could not get her home on account of the signing of the deeds. I always heard Thomas say that my mother was to get the same as my father after his death. I never heard him say anything else.

James Spooner, said : My mother got mad about it (that is about Thomas getting the deed) and went to a neighbour's house. My mother is a very old woman ; she is somewhat childish, and has been for fifteen or sixteen years. She did not understand what was going on, except that my father was signing away the property to Tom. She knew that the deed was going on, and she was not satisfied, because she had a hatred against Tom's wife.

Cross-examination :—My mother was not satisfied to go into any arrangement. She knew that the property was being parted with. She never was asked to sign off her dower in the land.

ARMOUR, J.—What did she go to the neighbour's house in the first place for ?

Because she was dissatisfied about making over the property to Tom.

ARMOUR, J.—And to keep out of the way, so that she would not have anything to do with it ?

Yes, that was the idea.

Jane Spooner, said : Question. "Do you remember what the arrangement was between your husband and your son ? Answer. It was all taken to Mr. Walker, and I know as much about it as my foot. James Spooner took his father out of the house to give Thomas Spooner a lease.

The evidence given in reply was as follows :

B. N. Britton, said : “ The plaintiff’s mortgage is a second one. I found the life lease on record. On making enquiry of these parties neither pretended that it had any force as between them, because they said that the deed which had been given was destroyed—burned by Thomas. Mr. Simeon Spooner said that the registration (of the life lease) was made by one of his daughters without his knowledge, and that he was surprised when he found it there.

Cross-examination.—I did not speak to the old lady. The old gentleman told me the reason why the thing was not carried out was because the old lady would not sign. I did not go to the registry to look about the life lease, because I was informed that it was annulled by the destruction of the deed.

Charles Anderson said : Simeon and Thomas Spooner said at the time the mortgage was executed that the deed from Simeon to Thomas had been destroyed.

The evidence shewed that a few days after Simeon had executed the deed to Thomas, his son, he became dissatisfied with what had been done, and he asked Thomas to destroy the deed, and Thomas took a newspaper out of his pocket and made his father believe the deed was in it, and he threw it in the fire, so that his father believed Thomas had burned the deed. But the sister, Caroline Smith, hearing the way the life lease was drawn, got hold of the deed and burned it.

The learned Judge said : “ The result of the evidence is, in my opinion, that Jane Spooner refused to accept the life lease, and it therefore conveyed no estate to her.

The verdict was therefore entered for the plaintiff.

In Michaelmas term, November 22, 1878, *George A. Boomer* obtained a rule calling on the plaintiff to shew cause why the verdict rendered for the plaintiff should not be set aside, and a verdict entered for the defendants, Richard Knight, James Smith, and Jane Spooner, on the

ground that the verdict was contrary to law and evidence and the weight of evidence.

In this term, February 13, 1879, *Osler* shewed cause. Jane Spooner, never having executed the lease, cannot take any benefit of it, because there are covenants in it on the part of her husband and herself as follows: that they, "the said parties of the second part, covenant to keep the said lands and premises in good condition, as the same are now, reasonable wear and tear in the use thereof, and fire and other casualties excepted; and will not, at any time, do, or suffer, any waste in the demised premises, nor underlet the same, nor any part thereof, nor make, nor suffer, any alteration therein without the consent of the said party of the first part for that purpose; and, also, that the party of the first part, or his agent, may enter the premises for the purpose of viewing and making improvements at reasonable times; and the parties of the second part covenant to pay all taxes or assessments as may be imposed on the said premises during said term." And as she cannot be made liable upon them, the lease is not available to her: *Siggers v. Evans*, 1 Jur. N. S. 651, 5 E. & B. 367; *Petrie v. Bury*, 3 B. & C. 353. The defendants must fail, also, because the deed from Simeon to Thomas Spooner, which supports the lease under which the defendants claim from Thomas, has not been registered: R. S. O. ch. 111, sec. 74; *Cooley v. Smith*, 40 U. C. R. 543, 564. The registration of the life lease is not actual notice of the deed from Simeon to Thomas Spooner. He referred also to *Haskill v. Fraser*, 12 C. P. 383; *Trust and Loan Co. v. Ruttan*, 1 Supreme Court Rep. 564.

McMichael, Q. C., contra. If it can be said Jane Spooner objected to take the life lease as a fact, it is to be considered she was then a married woman. But she did not object to the lease. She only objected to her husband conveying away the property. The evidence shews the plaintiff had express notice of the making of the deed by Simeon to Thomas before the mortgage was executed. That explanation became necessary because the lease was registered,

and it was stated the lease was of no effect, because the deed had been destroyed: *Smith v. Stuart*, 12 Grant 246.

March 7, 1879. WILSON, C. J.—The plaintiff took his mortgage with actual knowledge of the conveyance made by Simeon Spooner to his son, Thomas Spooner. It was from that knowledge, no doubt, that both the father and son were made parties to the mortgage. And they were so made parties from the knowledge which was obtained by the registration of the life lease and from the enquiries which were made consequent upon such mortgage, which led up to the making of the deed from the father to the son, and to its subsequent destruction.

I do not consider the registry law by reason of the non registration of that deed before its destruction as applicable here, because of the actual knowledge which the mortgagee had obtained of it previously to his mortgage.

If that defect of registration had been capable of being set up, I am of opinion that as both plaintiff and defendants claim from Thomas Spooner, the plaintiff is bound by the registration made prior to his mortgage of the life lease to Simeon and Jane Spooner, and as Simeon Spooner was bound by his acceptance of the lease from Thomas Spooner even although he had never conveyed to Thomas Spooner, and as that lease was duly registered, the plaintiff would be bound by such fact equally with Simeon Spooner.

The statute may, in my opinion, be laid out of the question. The lease which was made by Thomas Spooner to Simeon Spooner and Jane his wife, conferred upon them (assuming it to have been accepted for the present) an estate by entirety: *Cruise's Dig.*, vol. ii, Title 18, ch. 1, secs. 44 to 49, p. 374-5; *Doe dem Dormer v. Wilson*, 4 B. & A. 303; *Jarman on Wills*, 3rd ed., vol. ii., ch. 32, sec. 1, p. 231; *Gordon v. Whieldon*, 12 Jur. 988, 11 Beav. 170; *Preston on Estates*, 131.

I do not consider our statutes relating to the property of married women affect property which is conveyed or devised to husband and wife, which they take by law in entirety while husband and wife are both living.

If this be a case not coming within these statutes, the title conveyed to the wife by the lease she would not be bound to take during her coverture, but might disagree to it on her husband's death, so that anything she did or said in her husband's lifetime would not be binding upon her with respect to the acceptance or waiver of that estate: *Co. Lit.* 3 *a.*

She does not repudiate it now, for she defends this action by reason of it.

It was contended, however, that she had disagreed to and repudiated it in her husband's lifetime. I am not satisfied she did. She objected very decidedly to her husband giving Thomas Spooner the land. But she was weak and childish, and had been for many years, and she said herself that she knew as much about the arrangement between her husband and her son as her foot. A dissent given in such a case could not be much depended upon; but an assent might be more readily implied than a dissent, when the lease of the whole land to her for her life would be an advantage and benefit to her, which the law would presume she would take.

It may be argued that if she objected to her son getting the land she must necessarily have objected to the lease which the son made, as he could only make the lease upon his first of all getting the land. There is much force in that way of putting it; but I cannot say it is conclusive as regards a woman of her age and condition of mind and body.

Her son never thought that what his mother had said or done was a repudiation of the lease, for he always said she should have the lease for her life. She might have had some confused idea that her son should have given the lease without getting the land, and, if he had, it would have been a valid lease so long as the husband lived by estoppel, but as it was not separate estate of the wife, I think it would not have bound her after her husband's death. The case of *Doe dem. Smyth v. Smyth*, 6 B. & C. 112, has a bearing as to this alleged disclaimer.

The demise to Jane Spooner, in my opinion, is not void merely because she has not executed the lease, although there are covenants which she has professed to enter into.

Pitman v. Woodbury, 3 Ex. 4, 11, 12; *Morgan v. Pike*, 14 C. B. 473, are cases which apply where the *lessor* has not executed the lease and no term has ever been created; but here a term has passed, and that the lessee cannot be sued upon her covenants is not, I think, a reason why she may not hold the land if the lease were duly delivered by the lessor, as it certainly was in its present state.

I am of opinion the lessor could bring debt for the rent in respect of the privity of estate: *Lord Ward v. Lumley*, 5 H. & N. 87, 656, and he might sue in assumpsit or case since the husband's death, when the lessee has not executed the deed: *Burnett v. Lynch*, 5 B. & C. 589.

The lessee, Jane Spooner, may, although she has not executed the lease, take the term which was created by it, and I think it is a reasonable conclusion from the evidence that she did not repudiate the lease. But if she had in her husband's lifetime, for the reasons before stated, my opinion is, she would not be bound by what she then did. The rule should, I think, be absolute.

Rule absolute.

GALT, J., concurred.

MILLER V. REID.

Insolvency—Money paid within thirty days of insolvency—Action to recover same—Personal liability—Evidence.

A., carrying on business at St. Catharines, sold out his whole stock-in-trade and book debts, the purchasers assuming certain of the liabilities and paying an amount in cash. The sale was arranged and carried out by R., a creditor of A. and the father of one of the purchasers, into whose hands the purchase money was paid. A. was indebted to defendant in two notes given for goods purchased from defendant. These were paid by R. within thirty days of A. being declared insolvent, and out of the purchase money in R.'s hands. The payment was effected by drafts drawn by defendant on R., accepted by R., and discounted by defendant at a bank, to whom R. paid the amount thereof. The plaintiff, as assignee in insolvency of A.'s estate, sued defendant to recover back the moneys so paid him, and the learned Judge, who tried the case without a jury, found that defendant knew or had probable cause for believing that A. was insolvent. The defendant set up that the drafts were drawn and the money paid by R. under a personal undertaking by him contained in certain letters written to defendant. The learned Judge at the trial found for the plaintiff, and on motion to enter the verdict for the defendant, it was :

Held, per WILSON, C. J., that the money was the insolvent's, and was received by defendant with knowledge of the insolvency, and was not paid under any personal obligation incurred by R. : that it made no difference that the money was received by defendant from the bank, and not from R. personally ; and that the plaintiff should before action have restored to defendant the notes and R.'s acceptances, but that this should have been specially pleaded in defence.

Per GALT, J., that the money was paid in discharge of the personal obligation of R., who had no knowledge of A.'s insolvency, and might be deemed to be one of the liabilities assumed by the purchasers, and although the money might have formed part of the purchase money, that could not affect defendant, but was purely a matter between R. and A.

The Court being equally divided, the rule dropped, and the verdict stood ; but for the purposes of appeal the rule was directed to be discharged, without costs.

THIS was an action brought by the plaintiff as assignee of the estate of one Aikine, an insolvent, to recover the amount of two promissory notes made by the insolvent, and which were paid by one Rykert out of (as was alleged) money belonging to the insolvent, within thirty days before the insolvency, the defendant then being a creditor of the said Aikine, and then knowing that the said Aikine was unable to meet his engagements in full.

The cause was tried before Cameron, J., without a jury, at Hamilton, at the Winter Assizes of 1878.

The evidence, so far as material, is set out in the finding of the learned Judge at the trial, and in the judgment of the Court.

The finding of the learned Judge was as follows :

Upon the first question of fact, as to whether Mr. Reid knew or had reasonable cause for believing that this man was insolvent, I am in favour of the plaintiff and against the defendant.

I do not think it is necessary under the law that the defendant should know of the insolvency in such cases, but the circumstances should be such as to convey to the minds of reasonable men a belief that the debtor is insolvent. Now, I think that where a man is allowing his business paper to go to protest, and is neither able to take it up or renew it without borrowing from his creditor, that creditor could not have reasonably assumed that that man's business was at all in a flourishing condition. Then, if the creditor saw a large amount of paper, as has been represented in the present instance to have been the case, in the hands of the debtor, it would be but reasonable that he should require it to be utilized for the purpose of paying his debts, and it would be curious if a business man like Mr. Reid did not make an effort to procure it. It strikes me that this defendant did not take sufficient care in dealing with Aikine, if his own account of the transaction with him is correct. I think then I must find, as a matter of fact, that there was reasonable cause for believing that this man Aikine was not able to pay his debts. And I am justified by the subsequent circumstances in arriving at that conclusion.

We find by the evidence that within two weeks after the transaction a statement of Aikine's affairs, made under the insolvent law, establishes that he was in debt \$31,000, and that his available assets coming into the hands of the assignee were only \$16,000, of which a considerable portion was made up of securities derived from the sale of the goods, that is the \$8,000. I think that on the 25th or 26th, I rather incline to the view that it was on the 25th that

the interview took place, after that sale Mr. Reid knew that the estate which, as he says, had been represented to him as being worth some \$16,000 or \$17,000, had dwindled down to a little over \$8,000. It appears to me that there can be no question that there was reasonable cause for believing that Aikine's estate would not meet his engagements in full.

Then as to the question as to whose money this was, if Mr. Rykert had given his acceptance on the letter of the 22nd January, I should have said it was his personal obligation and he must be bound by it—the estate must obtain it from him. But Mr. Reid does not appear to have acted on the letter of the 22nd of January (*a*); for he did not draw immediately, as one would have supposed he would have done if he had been disposed to accept the offer that had been made then; and, according to the evidence, he was in St. Catharines about that time. According to the evidence given by himself on his examination, under the Administration of Justice Act, he was there on the 19th or 20th; he was there subsequently on the 25th or 26th; when in the witness box to-day he would not say it was the 19th or 20th; but in that examination he speaks of the interval occurring between his two visits as being about a week. His memory is not good. I acquit, as the counsel for the plaintiff does, Mr. Reid of any desire to make any representations that he does not believe to be correct. Mr. Rykert, on the other hand, is very precise as to what took place; and he says that what took place then led to his paying these two acceptances, and that it was not in consequence of anything that he had written on the 22nd of January, but in consequence of what occurred between Mr. Reid and him on the 25th or 26th of January that he wrote that. Then if it occurred where was the money to come from?

The letter of the 22nd of January shews that Mr. Rykert was about making arrangements for raising money from the purchase of the goods. Whose money would it be if realized in that way? It would be the money of Aikine. So that when he was speaking of paying that on the 22nd

(*a*) This is set out on p. 583.

he was speaking of paying it out of the money that was coming to Aikine from the sale of the goods. Then as to the question as to whether it was on the 25th or 26th of January that this interview took place, I incline to the view that it was on the 25th, because I think the writing of that letter of the 25th was a very natural thing to have done, in order to have satisfied Mr. Reid when he was there that his draft would be honoured, in order that he might have something under the hand of Mr. Rykert to shew that. He represents himself that it was at night that he was there, and it is scarcely likely that it was the night of the 26th, the Saturday night. It appears that the signature to the draft is that of Mr. Reid himself. Of course, it was quite possible that a blank draft might have been left and filled up. But why filled up? Not upon the strength of the letter of the 25th, because it does not appear that the letter of the 25th had reached Hamilton at the time that draft was drawn; and why should the officer in charge of Mr. Reid's business on the 26th of January have drawn then, when he had declined from the 22nd up to that time to draw.

It appears to me, then, that the probability is on the side of the view taken by Mr. Rykert, that the letter was written by him at that time and handed to Mr. Reid, as evidencing his good faith in saying that he would be responsible for that amount.

It strikes me as singular that Mr. Reid, a business man, going to St. Catharines for the very purpose of seeing a man who had made a transfer of his goods which would lead to loss on the part of the creditors, is unable to give any more clear or lucid account of what occurred between him and his debtor than he has done here to-day. Mr. Rykert says that Mr. Reid went to him, and told him that he could do nothing with Aikine. Then, if that is true, it corroborates Mr. Rykert's statement with regard to the day.

Mr. Rykert was not disposed to do anything under the circumstances, till he had authority from Aikine. He says he got authority from Aikine, and in consequence of that he gave the acceptances he afterwards paid.

It appears to me that Mr. Rykert was acting under the authority of Aikine; that it was, in point of fact, Aikine's money he was paying. Though I am free to admit that there is room for a great deal of grave doubt in regard to that question, and it may turn out that I am wrong with reference to it as a matter of law.

As it is, I find a verdict in favour of the plaintiff for the amount of the two drafts and interest.

Verdict for plaintiff and \$430.43.

In this term, February 6, 1879 *MacKelcan*, Q.C., obtained a rule *nisi* to set aside the verdict entered for the plaintiff and to enter a verdict for the defendant pursuant to the Common Law Procedure Act, upon the law and evidence, and upon the grounds following, namely: 1. That the money in question was not the property of the insolvent before or at the time it was paid by J. C. Rykert. 2. That the payment in question was not made by the insolvent, and therefore no cause of action arises under the statute. 4. It was not established that the debtor was unable to meet his engagements in full, or that the defendant knew of such inability or had probable cause for believing the same to exist. 4. That the securities given up by the defendant in consideration of the payments received by him, such securities consisting of the notes of Arthur Aikine and the acceptances of J. C. Rykert, were not restored to the defendant before the return of such payments was demanded, or before the commencement of this suit. 5. That the payments in question were not made to the defendant, but to the bank which had discounted the defendant's drafts on J. C. Rykert, and were received by the bank as the holders and owners of such drafts and not as the agents of the defendant. 6. And upon the ground that the payments in question were made by J. C. Rykert in discharge of liabilities he had himself incurred to the defendant, and the assignee of Arthur Aikine can have no cause of action in respect of such payments.

In the same term, February, 13, 1879, *Walker*, (of Hamilton), shewed cause.

MacKelcan, Q. C., contra.

The arguments sufficiently appear from the judgment of the learned Judge at the trial, and in the judgments of the Court.

The following authorities were referred to: *Churcher v. Johnston*, 34 U. C. R. 528; *Churcher v. Cousins*, 28 U. C. R. 540; *Clarke's Insolvent Acts*, 44, 278, 311; *McGregor v. Hume*, 28 U. C. R. 380; *Smith v. Hutchinson*, 2 App. 405, 409; *McWhirter v. Thorne*, 19 C. P. 302; *City Bank v. Smith*, 20 C. P. 93; *Marks v. Feldman*, L. R. 4 Q. B. 481, L. R. 5 Q. B. 275.

March 7, 1879. GALT, J.—The facts of the case are very simple: Aikine, the insolvent, carried on business at St. Catharines, and in January, 1878, being largely indebted to one Rykert and other creditors, among whom was the defendant, proposed to sell out his stock of goods, &c., to two persons of the name of Rykert & Burns, the son of his creditor. This transaction was carried out through the agency of Rykert, Sr.

Mr. Rykert states that he, Aikine, carried on that business till January, 1878. "The business was then purchased by Rykert & Burns; this Rykert was my son. They bought the stock in trade, and book debts. The sale was completed on the 24th of January, 1878. The purchase money was eight thousand one or two hundred dollars. I was acting for Mr. Burns and my son in the transaction. The purchase money was in my hands.

In answer to the question what became of the purchase money? "Well, there was a large number of liabilities assumed. Certain claims were mentioned and certain creditors were to be paid a certain amount in cash. I think some three thousand odd dollars in cash. This arrangement was not in writing. A certain amount of notes were turned out by me on account of the purchasers. Reid came to my house about the 26th of January to get some

money on account of his claim against Aikine. He found fault with Aikine for selling out, and asked me what amount I had still in my hands. I do not think I told him the exact amount in fact, I could not tell him to within two or three hundred dollars. I was ill in bed then. He urged me very strongly to pay whatever I had to him. I told him I could not tell what I could pay, but that he might draw upon me for the two amounts. I produce the drafts he drew upon me. I paid the draft of \$215 26 on the 1st of February, 1878. I produce the cheque by which I paid that. The second draft was dated 29th of January, 1878, and was for \$204 70. That I paid on February 4th, by a cheque I produce. These drafts were paid out of moneys in my hands belonging to Aikine, part of the purchase money of the stock."

It is unnecessary to refer further to the evidence as regards notice of insolvency, or reason to believe on the part of defendant that Aikine was unable to meet his engagements in full, as it has been carefully considered by the learned Judge, and if my opinion turned upon that I should not differ from him.

At the conclusion of the case the learned Judge says: "Mr. Rykert was not disposed to do any thing under the circumstances till he had authority from Aikine. He says he got authority from Aikine, and in consequence of that he gave the acceptances he afterwards paid. It appears to me that Mr. Rykert was acting under the authority of Aikine: that it was in point of fact Aikine's money he was paying, though I am free to admit that there is room for a great deal of grave doubt in regard to that question, and it may turn out I am wrong with reference to it as a matter of law. As it is, I find a verdict in favour of the plaintiff for the amount of the two drafts and interest."

I do not dissent from the finding of the learned Judge on this point as to the money being Aikine's money, in this, that it formed part of the purchase money, as Mr. Rykert has stated that it did; but I consider that was a matter between Mr. Rykert and Aikine, with which the defendant had no concern.

I arrive at this conclusion from the correspondence which took place between Mr. Rykert and the defendant.

It appears that the first note fell due on 22nd of January, on which day Mr. Rykert wrote as follows: "Mr. Aikine having allowed his business to get a little behind through too much credit and over buying it will be necessary to make some different arrangements. I have concluded arrangements by which Mr. Aikine will in a few days give over the business to my son and another gentleman in this city. I have to request that you will be a little indulgent for a time until the matter is finally settled. *The note which matured to-day I will pay early next week, and make arrangements with you which I trust will be satisfactory.*"

There is here a positive undertaking to pay the first note, made before the sale of the stock had taken place, which sale was not carried out until the 24th.

Then at the interview which took place at Mr. Rykert's house on the 26th, he states: "I told him I could not tell what I could pay, but that he might draw upon me for the two amounts."

There is some question whether the meeting was on the 25th or 26th, but it is of very little consequence, for on the 25th, Mr. Rykert wrote: "You may draw on me at three days sight for the note which fell due on the 22nd inst., and ten days for the note which falls due on the 30th inst., *Aikine will make arrangements with you himself for the others.*"

It appears to me that in the face of these letters it is impossible to treat the dealings between Mr. Rykert and the defendant, as respects these two notes, otherwise than as a personal engagement between them. It was for Mr. Rykert to consider the position in which he stood to Aikine,—the defendant had no concern with this. We find then that the defendant did on the 26th of January draw on Mr. Rykert for 215.26, to which draft the note due on the 22nd of January was attached, and which was paid by Mr. Rykert's cheque on the 1st February. Also that on 29th January he drew for \$204.92, to which the other note of \$203 was attached. This was duly paid by Mr. Rykert on 4th February.

I can come to no other conclusion than that these payments were made by Mr. Rykert personally. He states positively that he had no reason to believe that Aikine was unable to meet his engagements ; and also, in answer to the question, what became of the purchase money ? "Well there were a large number of liabilities assumed." I can consider these payments in no other light than as among these liabilities. If Mr. Rykert was not justified in so dealing with the purchase money, that is a matter with which the defendant has nothing to do ; he received the payments from Mr. Rykert, and not from the insolvent.

In my judgment the rule to enter a verdict for the defendant should be made absolute.

WILSON, C. J.—This was an action by the plaintiff as assignee of the insolvent, Arthur Aikine, for money received by the defendant under the following circumstances:

The defendant, a merchant in Hamilton, opened an account with the insolvent, who began business in St. Catharines in June, 1876. The defendant ceased giving him credit in the middle of December, 1877, because his account was too high—it was then \$2,100. The defendant went to St. Catharines in the beginning of January, 1878, to look at Aikine's stock, and to examine the state of his affairs.

He said: "I was not satisfied till I went down and examined. I found everything there was very satisfactory. He shewed me a surplus of nearly \$8,000. His stock amounted to something like \$10,000. I estimated it myself at that. I did not take stock. I think the book debts were in the neighbourhood of \$7,000. I made up his liabilities, from what he told me, at six or seven thousand dollars. I ascertained the liabilities by examining the ledger, cash book, and bill book. That was before the 4th of January. I cannot tell the date. I next went there on the 26th of January, because I had past due bills against Aikine, and I went to investigate his affairs. I had a bill against him for \$204.39, which was due on the 13th of January. That

bill was about due, but not past due, when I went down and investigated the state of his affairs. On the 7th of January there was a note of \$407.46 unpaid. Perhaps I went down to investigate his affairs to see why this bill was not paid. I never went to investigate his affairs till that occasion. We accepted a draft of his for \$200 on us on the 25th of January to meet a draft of ours upon him then due. I think that draft was \$489.58, due 27th December. He paid about half of it."

Then the defendant went to St. Catharines again, as Mr. Rykert said, three or four days before Aikine made the sale to Mr. Rykert on the 24th of January, 1878. The defendant denied that visit at the trial, although he said it was so in his examination before the trial, which would make that visit, if it were made, about the 19th or 20th or 21st of January.

On the 22nd of January, Mr. Rykert, the witness, not the Rykert of Rykert & Burns, the purchasers, but his father, wrote to the defendant: "I have concluded arrangements by which Mr. Aikine will in a few days give over the business to my son and another gentleman in this city. I have to request that you will be a little indulgent for a time until the matter is finally settled. The note which matured to-day" (of Aikine), "I will pay early next week, and make arrangements with you which I trust will be satisfactory."

The draft was not drawn for that until the 26th of January, which Mr. Rykert paid on the 1st of February. The amount was \$215.26.

If the defendant had drawn upon Rykert without any further communication with him, and Rykert had paid it out of Aikine's money, the defendant would have had nothing to do with that. Rykert was, by his letter of the 22nd of January, individually liable to the defendant, and for a good consideration, that of forbearance to Aikine. And the defendant could not have known, and would have had no reason to know, out of what moneys Rykert had discharged his own personal liability.

But the defendant did not so draw upon Rykert, nor was he so paid. He allowed the arrangement made by the letter of the 22nd of January to lie over until the 25th of January, and then on personal communication which he had with both Aikine and Mr. Rykert it was arranged that the defendant should draw at three days upon Mr. Rykert for the amount of the note, for \$215.26, and that Mr. Rykert should pay it out of Aikine's money, as I have found the fact to be when considering the defendant's liability upon the other note for \$204.72. These two sums, in my opinion, stand upon the same footing, and the defendant is as much liable for the former as he is for the latter note, for the reasons given when disposing of the second note.

As to the second, the facts necessary to be considered are: That Rykert & Burns on the 24th of January, 1878, bought out the whole stock and book debts of Aikine for about \$8,000. On the 25th of January the defendant went to St. Catharines, and on that day Aikine told him he, Aikine, had sold out the business, which the defendant said he understood included the book debts also. And Aikine referred the defendant to Mr. Rykert for the particulars.

The defendant then said: "When Mr. Rykert told me he had bought for \$8,000, I wanted to know if that would cover his liabilities, and he said that would cover all, and that he (Aikine) would have \$2,000 to the good. Aikine referred me to Mr. Rykert for the particulars of the sale and the business. Mr. Rykert agreed at that interview to pay some little drafts. He volunteered to pay them. I shewed Rykert a statement of all bills past due, as well as bills to become due. This is a copy of it. He marked those two bills voluntarily, [the two before mentioned,] and said I would have to look to Aikine for the rest of the bills. I understood the purchase money was passing through Rykert's hands. He told me to draw when I went home, and I drew. On the 25th of January Rykert wrote as follows: 'You may draw on me at three day's sight for the note which fell due on the 22nd inst., and

at ten days for the note which falls due on the 30th inst. Aikine will make arrangements with you himself for the others; and that letter was not written in consequence of the conversation which took place between me and Mr. Rykert."

The evidence shews Mr. Rykert did not accept a draft for the note which fell due on the 30th of January, which is one of the two mentioned in his letter last referred to, the amount of which is \$248.14, because, as the defendant said, his clerk made a mistake of some days in drawing.

The note which Mr. Rykert paid besides the one before mentioned for \$215.26, was one due on the 29th of January for 204.72, and is not specified in the letter of the 25th of January. The defendant said that Rykert never repudiated our right to draw for the note of \$248.14.

The questions which relate to the second payment, that is of the note for \$204.72, which fell due on the 29th of January, and was drawn for on that day and paid by Rykert on the 4th of February, are:

1. Was it Aikne's, the insolvent's, money?
2. If so, was it so known and agreed upon, although not in so many words, at the time Rykert arranged to pay it, and the defendant agreed to draw for it?
3. If so, was Aikine at that time unable to meet his engagements in full; and did the defendant know such inability or had he probable cause for believing the same to exist?

Mr. Rykert received \$3,000 cash on account of Rykert & Burns which he had to pay over or apply in part payment of the purchase money of \$8,000, the sum to be paid by them for the business and book debts which Aikine transferred to them. Mr Rykert was, as I understand, to distribute that money for Aikine among his creditors or among certain of them. It does not appear Aikine was to receive, or did receive any part of that sum; or indeed, so far as I can make out, any part of the \$8,000.

Rykert said: About the 26th of January the defendant came to my house to get some money on account of his claim

against Aikine. He found fault with Aikine for selling out, and asked me what amount I had in my hands. He urged me very strongly to pay him whatever money I had—to let him have all the money I could: that unless he got that money from me he would not get it out of Aikine at all. He made a strong appeal to me to pay him all the money I had in my hands; finally I told him I would pay the amount of two over-due notes: that he might draw upon me for the two amounts—\$215.26, \$248.14. These drafts were paid out of moneys in my hands belonging to Aikine, part of the purchase money of the stock. I had no reason to doubt his solvency. I thought he had plenty of means at the time of the sale of the stock. I paid out a great deal more than the amount of the stock. I paid \$2,000 more than I agreed to pay for Aikine, that is, composition notes and all. I certainly did over-pay the purchase money. I suppose that Aikine must have means to pay his liabilities. I do not know. I had no idea what his liabilities were. I suppose Aikine was insolvent when I bought him out. I think the defendant asked me to hand over the balance of the moneys which I had in my hands, which I declined to do. I think the defendant said that Aikine had told him that I had some moneys in my hands. I gathered from the whole conversation that he thought it was a hopeless case. The letter of the 25th of January was written after my interview with the defendant, and after I had seen Mr. Aikine. I think there was some talk of another draft, and upon comparing notes we found we would not be able to pay more than the \$215. Mr. Aikine asked me to retire the draft for \$204.72. I agreed the defendant should draw for the note of that amount. I declined to pay the draft for \$248, because I had not money enough to pay, and because I had not agreed to pay it; but if I had had enough money left in my hands I would have paid it.

Upon this evidence, as to the first question, I say that I entertain no doubt the money which was paid by Mr. Rykert to the defendant was Aikine's money. Mr. Rykert

got it for him and paid the whole of it for him, and, in my opinion, with Aikine's knowledge, consent, and directions.

As to the second question. I am of opinion both Rykert and the defendant knew the money so agreed to be paid by the one and to be received by the other was Aikine's money, a part of the price for the transfer of his business to Rykert & Burns.

As to the third question, Aikine was at the time the bargain was made on the 25th or 26th of January quite insolvent; and if the defendant did not actually know it, he had probable cause at any rate for believing that Aikine was then unable to meet his engagements in full. It is a very strong fact in favour of that view that the defendant in January had personally estimated Aikine's stock at about \$10,000, and the debts owing to him at \$7,000, and the debts he then owed at about \$8,000; and a few days afterwards that the whole of the stock and debts had been sold for about \$8,000, making a sacrifice of about \$9,000, and that Aikine could not pay more of the defendant's claim which amounted to \$2,100, than about \$420.

This last sum of \$204.72 the defendant is certainly liable for, and as the defendant was by his own agreement, in my opinion, and knowledge paid out of the moneys of Aikine at the time he had probable cause for believing Aikine to be unable to meet his engagements in full, when the first draft for \$215.72 was paid, he is liable to refund that sum as well as the other.

The defendant is, in my opinion, as much bound to account for the money as part of the estate of the insolvent, although he discounted the draft on Rykert through the bank and got the money from the bank, the bank receiving the money from Rykert on presentation of the defendant's draft to him, as if the defendant had personally received the money from Rykert. There can be no difference between a payment made to the defendant himself, and a payment made to his order.

Then it has to be considered whether the plaintiff can maintain the action and compel restitution of the money so

paid to the defendant without first having restored to the defendant the two promissory notes for \$215.26 and \$204.72, and also Mr. Rykert's acceptance for the amounts of these notes ? .

The 38 Vic. ch. 16, sec. 13, D., in the proviso, enacts as follows : " Provided always that if any valuable security be given up in consideration of such payment, such security or the value thereof shall be restored to the creditor before the return of such payment can be demanded." I think the defendant is entitled to get back the promissory notes which he held against Aikine, because they would be part of his proof on the insolvent estate : *Ex parte Greenway*, 6 Ves. 811 ; 38 Vic. ch. 16, sec. 104, D. ; *Clarke's Insolvent Acts*, 278. And also Mr. Rykert's acceptance, so as to put the defendant in the same position he was in before or at the time the payment was made to him.

In one sense the notes of Aikine are valuable securities, although no other person than the insolvent is liable upon them to the creditor ; that is, they would be valuable securities in law for another, if that other had a claim upon any valuable securities which the defendant held, as in *Guardians of the Poor of the West Ham Union v. Owens*, L. R. 8 Ex. 37. Although the notes are not however a security under section 84 of the Act which requires the creditor to put a value upon his securities, the defendant would not at law be entitled to sue upon them if his title as holder was denied, unless he could produce them. So in his proof in insolvency, he would in like manner require the possession of the notes.

I am of opinion, however, that the matter of defence relied upon should have been specially pleaded.

In *Frend v. Dennett*, 4 C. B. N. S. 576, a local board of health was empowered to contract under seal. In the action there was a plea denying that the board had contracted. The declaration did not shew a contract under seal. *Held*, the objection was open to the defendant, who was sued as clerk of the board upon a contract not under seal. .

Under that provision of the Statute of Frauds that "No

action shall be brought upon any contract or sale of any lands, * * unless the agreement upon which such action shall be brought, shall be in writing," &c., it was held that the defendant need not plead the want of a writing, but that the plaintiff must prove it on a traverse of the contract: *Buttemere v. Hayes*, 5 M. & W. 456. The Statute of Frauds alters only the evidence of the contract: *Fricker v. Thomlinson*, 1 M. & G. 772, per Maule, J.

In all those cases in which the plaintiff's case can be proved, it is necessary the defendant must plead specially such matters which shew that, notwithstanding the plaintiff's case is proved, he or she is not, nevertheless, liable, as in cases of gaming, usury, fraud, infamy, or coverture. None of these matters are a denial of the contract, but a confession and avoidance of it: *Leaf v. Tuton*, 10 M. & W. 393, 398.

In this case the plaintiff can prove his whole cause of action by shewing the payment within the thirty days before the writ of attachment issued, and that the defendant knew, or had probable cause for believing Aikine's inability to meet his engagements in full. If so, it is for the defendant to plead such matters which are in confession and avoidance, as the non-delivery back to the defendant of the valuable securities which he had given up, and which the statute says shall be restored to him before payment can be demanded from him.

Non constat that there was, so far as the declaration is concerned, any valuable security held or given up by the defendant.

If there were, it is for him to shew he gave it up, and that it has not been restored to him, and upon issue taken upon it the matter could be specifically tried.

In this case, too, the matter relied upon is contained in a proviso, and as the preceding part of the section is complete in itself it seems not to be necessary that the plaintiff should notice it, but it is matter of defence to be set up by the defendant, although the proviso is in the same section with the other part relied upon by the plaintiff: *Cathcart*

v. *Hardy*, 2 M. & S. 534; *Steel v. Smith*, 1 B. & Al. 94; *Thibault v. Gibson*, 12 M. & W. 88; *Charter v. Greame*, 13 Q. B. 216.

I am of opinion the verdict should be entered for the plaintiff, as the learned Judge found it at the trial, in whose judgment I quite agree both upon the law and the facts, and that the rule should be discharged.

The Court being equally divided, the rule dropped, and the verdict stood, but for the purposes of appeal the Court directed the rule to be discharged, without costs.

Rule discharged.

GAUTHIER V. THE CANADIAN MUTUAL INSURANCE
COMPANY.

Insurance—Sale of liquor on premises—Warranty—36 Vic. ch. 44, secs. 32, 36, O.—Statutory conditions—Renewal of policy.

In a policy of insurance effected by the plaintiff for a year in a mutual company, the premises insured were described as a two story brick building, &c., occupied as a tenement dwelling. By a memorandum afterwards endorsed on the policy the building was allowed to be "occupied as a refreshment room, no liquor sold." Afterwards the policy was renewed by a renewal receipt issued under sec. 32 of the Mutual Insurance Act, 36 Vic. ch. 44, O. The building was occupied by a tenant of the plaintiff, and it was proved that liquor was sold in the building by the occupant, but without the knowledge or consent of the insured. The defendants set up in their pleas a condition of the policy that if the hazard was increased by any means within the knowledge of the assured without the defendants' consent, the policy should be void; and alleged that liquor was sold to the knowledge of the insured, and without the company's consent, whereby the hazard was increased. The conditions endorsed on the policy did not comply with the Act respecting statutory conditions which were in force when the policy was renewed.

Held, that although under sec. 36 of the Mutual Act, which required policies to be under the corporate seal, the endorsement when made, being after the execution of the policy, might not then be deemed a part thereof, it became so on the renewal authorized by sec. 32 of the Act, so as to cause the policy to be avoided for the unauthorized sale of liquor on the premises.

Per WILSON, C. J.—Even if the condition set out in the pleas was not binding on insured, as not in accordance with the statute, the defendants might set up, under sec. 40 of the Mutual Act, that the risk was increased after the insurance was effected by reason of the sale of liquor (such section not making the knowledge of the insured essential), whereby the policy was avoided; and the pleas might be amended accordingly.

Per GALT, J.—The effect of the memorandum was, to alter the description so as to include the provision as to the sale of liquor in such description, and being a matter of description it was binding as a warranty, and there being a breach thereof the policy was avoided.

THE declaration alleged that by a policy of insurance, dated the 4th of January, 1876, and by a certain renewal receipt, the defendants insured the plaintiff to the amount of \$2,000 against loss by fire, from the 4th of January, 1876, up to and covering the period of the loss and damage by fire, &c., on certain premises described as "No. 1, a two-story brick building, with basement, covered with shingles, occupied as tenement dwelling, situated on lot A., east side

of Bedford street, in the Town of Sandwich," alleging a loss by fire and non-payment of the amount insured.

The only pleas material are the fifth and sixth pleas.

Fifth plea: That the said policy of insurance was upon and subject to the conditions expressed in and endorsed on the back of said policy of insurance, and that among other conditions so expressed in and endorsed on said policy of insurance was the following: "If the hazard be increased by any means within the knowledge of the insured, without the consent of the defendants, then the said policy should be void, and that no liquor should be sold upon the said premises." And the defendants aver that the said building was, without the consent of the defendants, used for other purposes than those set forth in the said policy of insurance, and in the application therefor, which forms part of said policy of insurance, namely, it was so used as an unlicensed tavern or hotel, and liquor was sold and allowed to be sold in said building insured as aforesaid, as the plaintiff well knew, whereby the said hazard was increased by means within the knowledge of the assured, and the said policy became forfeited and void.

Sixth plea: That the said policy of insurance and renewal receipt was upon and subject to like conditions as those set forth in the said fifth plea, and that after the issuing of the said policy of insurance, and before the said loss, namely, on the 3rd of August, 1876, the plaintiff applied to the defendant for leave to use the said building as a restaurant, and that permission to use said building as a restaurant, provided no liquor should be allowed to be sold thereon, was then given by the defendants to the plaintiff, and that afterwards, viz., on the 12th of January, 1877, the plaintiff applied for a renewal of his said policy for one year from the 28th of December, 1876, and in such application it was stated that no change affecting the risk had been made; and the defendants, upon and subject to the statements contained in said application for renewal, renewed the plaintiff's policy for a year from the said 28th of December, 1876. And the plaintiff after such renewal,

and without the consent of the defendants, allowed the said building to be used for purposes other than that of a restaurant, namely as and for the purposes of an inn, tavern, and hotel, and liquor was sold and allowed to be sold from time to time in said building, as the plaintiff well knew, and the said hazard was thereby increased by means within the knowledge of the plaintiff, and the said policy and renewal thereof thereby became void.

Issue.

The cause was tried before Armour, J., without a jury, at Sandwich, at the Spring Assizes of 1878.

The policy was put in. It was dated 4th of January, 1876, and numbered 3820, and was for one year. In it the insured premises were described as set out in the declaration.

On the 3rd of August, 1876, the following memorandum was endorsed by the company on the policy: "In consideration of additional premium of \$6.65, building No. 1 is allowed to be occupied as a refreshment-room, no liquor sold."

"Hamilton, 3rd August, 1876."

The policy was renewed by a renewal receipt as follows:

"Received from J. B. Gauthier, of Sandwich, the sum of \$14.10, premium for renewal of policy No. 3820," &c., "for one year from 28th of December, 1876."

This was dated 12th December, 1876.

The learned Judge found as follows:

"I find that the policy was the deed of defendant: that the building was totally destroyed by fire during the currency of the policy: that it was of the value of \$3,000, and upwards: that the plaintiff was the sole owner of it: that liquor was sold in the building by the occupant, but without the knowledge or consent of the owner, the plaintiff; and I find all the issues in favour of the plaintiff. The policy was renewed after the Act respecting uniform conditions, and must be looked upon as a policy without conditions."

The learned Judge accordingly entered a verdict for the plaintiff, with \$2,060 damages.

In Easter term, May 23, 1878, *Duff* obtained a rule *nisi*, under the Law Reform Act, to set aside the verdict entered for the plaintiff, and to enter a verdict for the defendants, on the ground, amongst others, that the evidence shewed that liquor was sold on the insured premises, and because the plaintiff knew liquor was being sold on the insured premises, by which the policy of insurance became void.

In this term, February 6, 1879, *Robinson*, Q. C., shewed cause. Under the condition relied upon by the defendants, and set out in the fifth plea, the knowledge of the insured is made material, and the risk must be increased. The learned Judge here expressly found that the sale of liquor took place without the knowledge of the insured, and there is no finding that the risk was increased. The policy must however be deemed to be without conditions. At the time of the renewal the Act respecting statutory conditions was in force, and the conditions endorsed on the policy were not made in the manner required by the statute. Even if according to the judgment of Gwynne, J., in *Geraldi v. Provincial Ins. Co.*, 29 C. P. 321, the policy is to be adjudged to be subject to the statutory conditions, none of such conditions refer to the sale of liquor. The fourth condition is the only one which could be held as applicable, but under it, the increase of the risk and the knowledge of the assured are made material. He referred to *May* on Insurance, 167, 171, 266; *Harrison v. Douglas*, 3 Ad. & E. 396; *Sandford v. Mechanics' Mutual Ins. Co.*, 12 Cush. 541; *Sansum's Ins. Dig.*, 650; *Storms v. Canada Farmers' Mutual Ins. Co.*, 22 C. P. 75; *Dickson v. Provincial Ins. Co.*, 24 C. P. 157.

MacKelcan, Q. C., and *Duff*, contra. There was clearly a breach of the condition set out in the fifth plea. The assured must be assumed to have had knowledge of liquor being sold on the premises. The son, the occupant, was twice fined for selling liquor therein without a license, and this must have come to the knowledge of the plaintiff, who lived in the same town. The pleas were therefore proved. There was, however, no necessity to prove knowledge. On

the renewal of the policy, the memorandum endorsed thereon became a part and a condition of the policy, and being a matter of description must be deemed to be a warranty. The plaintiff warranted that no liquor should be sold on the premises, and therefore, there having been proved to have been a breach of warranty, it was immaterial whether the plaintiff had knowledge or not.

March 7, 1879. WILSON, C. J.—The original policy bears date the 4th of January, 1876, and expired on the 27th of December, 1876.

On the 3rd of August, 1876, while the original policy was in force, the company made an endorsement upon the policy as follows:—"In consideration of additional premium of \$6.65, building No. 1 is allowed to be occupied as a refreshment-room, no liquor sold," which was signed by the secretary of the company.

The 36 Vic. ch. 44, sec. 36, O., required that all policies should be under the seal of the company.

The endorsement made on the deed after its execution and delivery did not make it a part of the deed. That policy, however, was renewed by a receipt attached to the policy. The receipt is: "Received from J. B. Gauthier the sum of \$14.10, premium for renewal of policy No. 3820," &c., "for one year from the 28th of December, 1876." It is dated the 12th day of December, 1876.

Section 32 of the Act declares that "Any policy that may be issued for one year or any shorter period, may be renewed at the discretion of the board of directors by renewal receipts instead of policy," &c. So that the policy originally issued was duly renewed. Now at the time of that renewal the endorsement forbidding the sale of liquor was upon the policy. So that the endorsement from the time of such renewal became a part of the policy as renewed, and my brother Galt is right in treating it as a part of the policy. At the time of the renewal the Act relating to the statutory conditions was in force, so that if the condition in the policy, "If the hazard be increased by any

means within the knowledge of the assured, without the consent of this company * * this policy shall be void," as relied upon in the fifth and sixth pleas, is not to be held binding on the plaintiff, because the conditions are not set forth as that statute requires, the defendants should be allowed to plead according to section 40 of the Mutual Insurance Act of 1873, that the risk on the premises destroyed by fire was increased, (by the means in the fifth and sixth pleas set forth) after the insurance had been made thereon with the company, whereby it was exposed to greater risk or hazard from fire than it was when the insurance was effected, and no previous notice thereof was given in writing, nor was the requisite additional premium note or deposit after such alteration given or paid to the directors, whereby the policy became void. That being an enactment of the legislature cannot be considered a condition of the insurance company, and there is no reason why the plaintiff should not be bound by it. That provision of the statute does not require that the risk should be increased "within the knowledge of the assured," and it is in that respect stricter than the condition set out in the fifth and sixth pleas.

I agree that the exclusion of selling liquor is to be construed as a condition; and I am also of opinion that the defendants should be permitted to amend these pleas as before stated, if they desire to do so, and in that case and upon that ground I conceive they would be entitled to succeed.

The merits of the case are with the defendants, who are asked to pay for a loss under circumstances in which they expressly bargained with the plaintiff they should not be liable.

The rule should be made absolute.

GALT, J.—In my opinion, upon the finding of the learned Judge that liquor was sold in the building by the occupant, but without the knowledge or consent of the plaintiff, this rule should be made absolute.

The premises destroyed were insured by a policy dated 4th of January, 1876, and were described as "A two-story brick building, with basement, covered with shingles, occupied as tenement dwelling, situate on lot A., east side of Bedford street, in the town of Sandwich."

By a memorandum endorsed on the policy this occupation was changed: "In consideration of additional premium of \$6.65, building No. 1 is allowed to be occupied as a refreshment-room, no liquor sold. Hamilton, 3rd August, 1876."

The effect of this memorandum is, in my opinion, to alter the description, which will then read as follows: "A two-story brick building, with basement, covered with shingles, occupied as a refreshment-room, no liquor sold." This being matter of description is binding as a warranty on the part of the insured, and as liquor was sold, although without the knowledge of the insured, the warranty was broken, and the plaintiff cannot recover.

Rule absolute.

MEMORANDA.

During Michaelmas Term the following gentlemen were called to the Bar :—

WILLIAM EGERTON PERDUE, ELGIN SCHOFF, JAMES HAVERSON, JOHN COWAN, ERNEST HENRY EDEN EDDIS, EDWARD SYDNEY SMITH, JOHN GILBERT GORDON, JOSEPH ALFRED WRIGHT, CHESTER GLASS, PETER VANCES GEORGEN, JAMES PEARSON, JOHN BISHOP, FREDERICK WILLIAM BARRETT, THOMAS WILLIAM HOWARD, DANIEL BAYARDE DINGMAN, JOHN INKERMANN MACCRACKEN, JAMES DOWDALL, JOHN HODGINS, REGINALD GOURLAY, JOHN MACGREGOR, WILLIAM JEX, CHARLES MCMICHAEL.

SITTINGS IN VACATION

AFTER HILARY TERM.

KNOWLTON ET AL. v. MACKAY.

Agreement to pay a named sum for not buying goods—Liquidated damages or penalty,

Declaration: in substance that the defendant agreed under seal, to manufacture into pot barley, and to store for plaintiffs certain barley of the plaintiffs, on or before the 15th of July, 1878, and on said date to purchase said barley and pay therefor the sum of \$785: that it was further provided, that in case defendant did not pay the said sum of \$785 on the said date, defendant should pay the plaintiffs the sum of \$100 as liquidated damages. Breach, nonpayment of the \$100. Defendant demurred on the ground that the \$100 claimed as liquidated damages was in fact a penalty, and could not be recovered. *eld*, that the declaration was good. 1. That this question could not properly be raised by demurrer, for the plaintiffs were entitled to some damages; and 2, that the \$100 was not a penal sum or forfeiture for not paying money due, or for any ordinary debt or claim, but liquidated or agreed on damages for not buying at a named price goods of a fluctuating and uncertain value.

DECLARATION: for that whereas in, under, and by virtue of an agreement under seal, dated 11th June, 1878, the defendant agreed to manufacture into pot barley certain barley of the plaintiffs, and store the same at the Great Western Railway station in Dundas, in the County of Wentworth, in the name of the plaintiffs, on or before the 15th July, 1878; and further, in and by the said agreement the defendant agreed to purchase the said barley on the said 15th July, and pay the plaintiffs for the same the sum of \$785. And whereas the plaintiffs forthwith, upon the making of the said agreement, delivered or caused to be delivered to the defendant the said barley to be manufactured as aforesaid. And all acts were done, all conditions

fulfilled, and all things happened to entitle the plaintiffs to the fulfilment of the said agreement, yet the defendant did not manufacture the said barley into pot barley, and store the same in the name of the plaintiffs at the said station or elsewhere by the 15th July aforesaid, or since, and did not pay as agreed for the said barley at the said price, or any part thereof, on, before, or since the said 15th July. And whereas in and by said agreement it was further provided that in case the defendant did not pay the said sum of \$785 for the said barley on the said 15th July aforesaid, the defendant should pay to the plaintiffs the sum of \$100 as liquidated damages, by means whereof the defendant has become liable to pay the said sum of \$100, as in the agreement mentioned, nevertheless he has not paid the said sum of \$100, or any part thereof, although requested so to do, but hath wholly neglected and refused so to do, and therein failed and made default, contrary to the form and effect of the said covenant.

Demurrer: that the sum of \$100, claimed in this count as liquidated damages, is in effect a penalty for the non-payment by the defendant of the sum of \$785 at the time agreed upon for payment thereof, and an action will not lie for the recovery of such penalty.

March 21, 1879. *MacKelcan*, Q. C., for the demurrer. The sum of \$100 agreed to be paid in the event of the non-payment of the \$785 on the day named, though stated to be liquidated damages, is in fact a penalty; and equity will relieve against the enforcement of a penalty in such case. Under the A. J. Act, sec. 8, a Court of law now possesses the same powers as a Court of equity as to granting relief, and therefore the right to maintain the action may now be raised on demurrer. All that the plaintiffs can recover for the non-payment of a sum of money is interest as damages, but no such claim is set up in the declaration: *Thompson v. Hudson*, L. R. 4 H. L. 1; *Story's Equity Jurisprudence*, 12th ed., secs. 1314, 1316, 1321; *Watson v. Mason*, 22 Grant 574;

Bank of Hamilton v. Western Assurance Co., 38 U. C. R. 609; *Re Dagenham Dock Co.*, L. R. 8 Ch. 1022; *Betts v. Burch*, 4 H. & N. 506; *Reynolds v. Bridge*, 6 E. & B. 528.

Browning, (of Dundas) contra. The \$100, so agreed to be paid must be held to be liquidated damages and not a penalty. The plaintiffs deliver over to the defendant the barley, to be manufactured into pot barley, and to be stored in the plaintiffs' name. Barley has no certain or fixed value, but is regulated by the market value. The parties agree that the defendant is to purchase the same on the 15th July and to pay \$785 therefor. There is nothing to prevent the parties stipulating that if the defendant should fail to purchase on the day named he should pay a fixed sum, as here, \$100. The object is to cover the difference in the market price, and the storage of the goods, and other expenses the plaintiffs may be put to through the defendant's default. In any event, the plaintiffs are entitled to recover interest, and the declaration would cover such a claim. The question is one of damages; and the demurrer is to the damages and not to the cause of action. The whole question which the defendant has set up by the demurrer, would be open to him on a traverse of the declaration.

March 28, 1879. HAGARTY, C. J.—It appears to me that the defendant has taken the wrong course in demurring to this count. He could properly raise the question as to penalty or liquidated damages on a traverse, or he could raise it by paying such amount into Court as he considered would cover damages in his view, and the plaintiffs could reply damages ultra, or perhaps raise the question by demurrer, on the ground that the damages were agreed on. It is in fact a demurrer to the damages, not to the cause of action. The plaintiffs are entitled to some damages.

Galsworthy v. Strutt, 1 Ex. 659, shews the course of pleading in days when pleading was a stricter science than at present. The claim was, as here, for a named sum as liquidated damages. Plea, payment into Court £50. Replication, damages ultra. At the trial and in term the whole question of penalty or liquidated damages came up.

Betts v. Burch, 4 H. & N. 506, shews a similar way of pleading.

Bramwell, B., there points out that the true ground of holding such a stipulation to be a penal sum is on the statute 8 & 9 Wm. III. ch. 11, sec. 8, which refers to actions upon "any bond or on any penal sum for non-performance of any covenant or agreement contained in any indenture, deed or writing."

In *Hinton v. Sparkes*, L. R. 3 C. P. 161, the same question arises on ordinary traverses.

Willes, J., says, at p. 166, that the judgments of Barons Martin and Bramwell in *Betts v. Burch* "present as satisfactory and full a view of the cases and of the principles and reasoning applicable to them as is to be found in any book, or indeed in all the books put together."

As a mere question of pleading, I think the demurrer is improper.

On the main point, I think, the plaintiffs are right—so far as the pleadings shew the facts.

Mr. MacKelcan argued that the breach was merely for not paying money, and cited authorities to shew that such damages as here claimed could not be recovered. But the cases do not seem to me to touch the present. This is not a penal sum or forfeiture for not paying money due, or for any ordinary debt or claim. It is this: "you have on hand certain goods of mine, (value not stated), and on 15th June you agree to purchase them from me for \$785; if you fail in purchasing at the price we agree you shall pay me \$100." These are the agreed damages for one single breach of contract, for not buying at a named price goods of fluctuating and uncertain value. It seems like a contract to buy an estate at a fixed sum, bargain to be completed at a named day. A deposit is made, and agreed to be forfeited if the intending purchaser fail to buy. This is quite lawful—see the case just cited of *Hinton v. Sparkes*. In the notes to *Gainsford v. Griffith*, 1 Wms. Saund. 74, (ed. 1871) it is said: "The law, nevertheless, remains unshaken, that parties may, by mutual agreement, settle the amount of damages, un-

certain in their nature, in respect of the performance or omission of a particular specified act, at any sum upon which they may agree."

I also refer to *Sedgwick* on Damages, 6th ed., 502 *et seq.*; *Mayne* on Damages, 3rd ed., p. 130, where the point is very clearly stated. See also *Sparrow v. Paris*, 7 H. & N. 594.

The judgment will be for the plaintiff.

Judgment for plaintiff.

STONE V. KNAPP.

Husband and wife—False representation by wife—Action for.

A declaration alleged that the defendant, the wife of one K., by falsely and fraudulently representing to the plaintiff that she was authorized by her husband to order certain goods for her daughter's wedding outfit, and to pledge his credit therefor, induced the plaintiff to furnish the goods, and to charge the same to the husband; and that she had in fact no such authority, as was decided by the Court of Appeal, who gave judgment for the husband, reversing the judgment of the County Court in an action brought by the present plaintiff against the husband for the value of the goods, and his costs incurred in the County Court and in Appeal. The defendant pleaded coverture.

Held plea good: that the Administration Justice Act could not assist the plaintiff, and that secs. 6, 20, of the Married Woman's Act, R. S. O. ch. 125, do not create any new liability against a married woman for her *torts or quasi torts*, but merely allow her to be sued alone, where formerly she could have been sued with her husband, and the authorities shewed that if so sued the action would have failed.

DECLARATION.—For that the defendant, then being the wife of Solomon M. Knapp, a well-known responsible man, whose daughter Charlotte, then being with him, was about to be married to a son of the defendant, did falsely and fraudulently represent and pretend that she was authorized to order, and did order certain goods of the plaintiff for and on account of and to be charged to the said Solomon M. Knapp, to be used in making the wedding trousseau of the said Charlotte Knapp, and that said goods

would be paid for as soon as the bill thereof was presented to him, the said Solomon M. Knapp; and the plaintiff, relying on the said representations of the defendant, and believing that the defendant had authority from the said Solomon M. Knapp to order the said goods for the wedding trousseau of the said Charlotte Knapp, for and on account of and to be charged to the said Solomon M. Knapp, did then send and deliver said goods to the said Charlotte Knapp, at the residence of the said Solomon M. Knapp, and the same were used and made up in the said wedding trousseau, whereas in truth and in fact the defendant was not, as she very well knew, authorized by the said Solomon M. Knapp to order the said goods, or any goods, for or on account of or to be charged to the said Solomon M. Knapp, but then well knew that the said representations were false: that the said Solomon M. Knapp having refused to pay for the said goods, and the same being wholly unpaid for, he, the plaintiff, trusting in the said representations of the defendant, sued the said Solomon M. Knapp in the County Court in the County of Kent, in an action for the price of the said goods, amounting to \$106.99, which the said Solomon M. Knapp defended and denied his liability thereon, which cause came on to be tried at the sittings of the said County Court, on the eleventh day of June, A.D. 1877, before the Judge of the said County Court and a jury sworn to try the said cause, when a verdict was rendered by the said jury for the plaintiff therein, which verdict was afterwards, on an appeal from the judgment of the learned Judge of the said County Court discharging the rule *nisi* in said cause, set aside and a verdict entered for the defendant therein, pursuant to the order of the Court of Appeal for Ontario, on the ground that the said defendant herein had no authority to order the said goods on the credit of the said Solomon M. Knapp, the defendant in the said County Court suit, whereupon and by reason of the premises the plaintiff had not only lost the said price of the said goods, which had not yet been paid, but also became liable to pay and did pay divers large sums of money amounting to wit to

\$200, in unsuccessfully suing the said Solomon M. Knapp, and also became liable to pay and did pay the said Solomon M. Knapp the further sum of \$150 for his costs in defending said action and of appeal.

Plea: that at the time of the making of the said alleged agreement, and of the happening of the several events in the declaration mentioned, and at the time of the commencement of this action, the defendant was and still is the wife of the said Solomon M. Knapp.

To this plea the plaintiff demurred, on the ground that it was no answer to the said declaration.

March 11, 1879. *Bethune*, Q. C., for the plaintiff. Under the circumstances set out in the declaration the plaintiff could, previous to the Administration of Justice Act, have filed a bill in equity to realize the claim out of any separate estate the defendant might possess: *Vaughan v. Vanderstegen*, 2 Drew. 165, 363, 378-9; *Hobday v. Peters*, 28 Beav. 354; *Graham v. Meneilly*, 16 Grant 661, 664. And now under that Act he can maintain an action at law therefor. Moreover under the Married Woman's Act, R. S. O. ch. 125 sec. 20, a married woman may be sued for such a tort as this.

H. J. Scott, for the defendant. The cases of *Liverpool Adelphi Loan Association v. Fairhurst et ux*, 9 Ex. 422, and *Wright v. Leonard et ux*, 11 C. B. N. S. 258, settle the law, and decide that such an action as this cannot be maintained against a married woman. The equity cases cited merely shew that a married woman will be held liable in equity for torts relating to her separate estate. The Married Woman's Act altered the procedure by enabling a married woman to be sued alone where the husband would formerly have to be joined, but does not render her liable to be sued alone, where prior to its passing she could not be sued with her husband.

March 14, 1879. *HAGARTY*, C. J.—I am bound to decide this demurrer merely on the actual state of the plead-

ings; and I cannot see how the Administration of Justice Act can affect the decision, as urged by Mr. Bethune. The defendant is sued alone under the authority of the Ontario Act. If sued in England with her husband, it is conceded that in the present state of the authorities the case would fail. *Liverpool Adelphi Loan Association v. Fairhurst et ux.*, 9 Ex. 422, is an express authority.

The wife fraudulently represented that she was sole and unmarried, and signed a note in another name as a surety, on which the plaintiff advanced money.

Alderson, B., says, at p. 427: "It seems to me that the torts of the wife, for which the husband is to be considered as responsible, are those only which are purely torts, that is to say, such as are in no way connected with a contract."

The Court held, at p. 429: "If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture; for this is not a contract of any kind which a *feme covert* could make, whilst she knew her husband to be alive, that could not be treated as a fraud. For every such contract would involve in itself a fraudulent representation of her capacity to sue."

Seven years later, *Wright v. Leonard et ux*, 11 C. B. N. S. 258, was decided. The wife had fraudulently represented that certain acceptances were the acceptances of the husband whereby the plaintiff was induced to discount them. They turned out to be forgeries.

Sir Wm. Erle, C. J., and Byles, J., held the action would not lie.

Williams and Willes, JJ., held that it did lie, distinguishing it from the case in 9 Ex. 422. Williams, J., withdrew his judgment, as the plaintiff desired to appeal, and judgment was given on demurrer for defendants.

I cannot trace the case further.

It will be observed that in this last case the wife had not herself become liable on the contract.

The Chief Justice says, at p. 268: "The law makes him," the husband, "answerable for wrongs done by his wife to the

property, person, or character of another, but not answerable for contracts made by his wife. It seems to me that a false representation by which credit is obtained is in its nature more fit to be classed with contracts than with wrongs. It is in substance a warranty of a debt, and so a contract. * * In substance, she becomes a guarantor for a third party, and makes a contract for which in the form of contract the husband is not answerable."

I follow this view of the law.

Mr. Bethune urges that under the Ontario Act, she can be sued alone.

Section 6 of our Act, R. S. O. ch. 125, declares: "Nothing herein contained shall be construed to protect the property of a married woman from seizure and sale on any execution against her husband for her torts; and in such case, execution shall first be levied on her separate property."

Section 20 * * * And any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts, as if she were unmarried."

We have now to determine whether the Legislature has, by these words, created a new liability against the married woman, for her tort or *quasi tort*, or has it merely allowed her to be sued alone, where formerly she could only be sued with her husband. I incline to the latter opinion.

Our Courts have already in effect decided that as to her contracts, we have now merely the legal remedy by suit and execution against her separate property which formerly could only be reached by the Courts of Equity, and that she may be sued alone therefor.

To the alleged contract charged against her, the usual plea of coverture is met by a replication charging that she has separate estate, &c. So I understand the decision of our Courts and the Court of Appeal in *Darling v. Rice*, 1 App. 43, and *Lawson v. Laidlaw*, 3 App. 77.

It was argued before me that the latter case went beyond those preceding. I do not see that it departs from the grounds previously acted upon.

It is pointed out there, at page 88, that the Act while it "made her liable to be proceeded against separately from her husband in respect of her separate debts, engagements, and torts as if she were unmarried, stopped short of enabling her to contract in all cases as a *feme sole*, as we had occasion to point out in *Darling v. Rice*." At page 89 the view suggested by Wilson, C. J., in *Wagner v. Jefferson*, 37 U. C. R. 551, and lately in *Consolidated Bank v. Henderson*, 29 C. P. 549, is noticed but not adopted.

I act on the views there expressed. I hold that no fresh liability is created against this married woman, larger than before when sued with her husband, and that as, in the present state of the authorities, an action like this would fail against them sued jointly, it equally fails against her sued alone under our statute.

I decide the case wholly on the declaration, plea, and demurrer before me, expressing no opinion on the case not there presented.

The judgment will be for the defendant on the demurrer.

Judgment for defendant.

NIAGARA DISTRICT MUTUAL FIRE INSURANCE COMPANY
V. GORDON.

Mutual insurance—Alienation of insured property—Liability on premium note for subsequent losses—R. S. O. ch. 161, sec. 41.

Sec. 41 of R. S. O. ch. 161, provides that "in case any property real or personal is alienated by sale," &c., "the policy shall be void, and shall be surrendered to the directors of the company to be cancelled, and thereupon the assured shall be entitled to receive his deposit note or notes upon payment of his proportion of all losses which have accrued prior to such surrender."

Held, that under this section the said alienation avoided the policy wholly, so as to deprive the assured of any remedy thereon, and enabled him, upon payment of all prior losses and surrendering the policy to be cancelled, to relieve himself from further liability to assessment on his premium note.

DECLARATION: For that the plaintiffs are a Mutual Insurance Company duly incorporated pursuant to the provisions of the Consol. Stat. U. C. ch. 52, and amendments thereto, and subject to the provisions and amendments contained in the 36 Vic. ch. 44, O., and entitled "An Act to consolidate and amend the laws having reference to Mutual Fire Insurance Companies in the Province of Ontario," and also to the provisions and amendments contained in ch. 161, R. S. O., and carried on business in the Province of Ontario, and had their head office at St. Catharines in said Province; and that on 1st April, 1876, the defendant made an application for insurance with the plaintiffs against loss or damage by fire to the amount of \$1,000, for the term of three years, from the 1st April, 1876, on certain property of the defendant therein described, and the said defendant at the time of making such application gave to the plaintiffs the undertaking of the defendant in the words and figures following:—

'Application 237.

"Policy No. 25,006.

"\$224.00

Sunderland, 1st April, 1876.

"I hereby undertake and agree to pay to the Niagara District Mutual Fire Insurance Company on demand, for value received in a policy in the above company, at their office in St. Catharines, Ontario, any sum or sums

of money which they may from time require of me, provided that such sums and the amount now paid and endorsed thereon should not exceed in the aggregate the sum of two hundred and twenty-four dollars."

Witness, (Signed) "WILLIAM GORDON."

(Signed) "WILLIAM E. ELLIS."

And the defendant thereupon paid to the plaintiffs the sum of \$22.40 on said undertaking, and the plaintiffs accepted the said application for insurance, and in consideration of said undertaking of the defendant issued to the defendant their policy of insurance under their corporate seal, signed by their president and countersigned by their secretary, in accordance with the terms and conditions set forth or referred to in said application, and for the respective amounts therein applied for on the said property in said application set forth, which policy was numbered 25,006. And the plaintiffs afterwards, to wit, on 1st October, 1876, under the direction of the board of directors of said plaintiffs, assessed the said undertaking of the defendant in the sum of thirty-five per cent. of the amount of his said undertaking to meet the losses and other expenditures of said company, during the currency of the said policy for which said undertaking was liable to assessment; and notice was given to the defendant of such assessment upon his said undertaking by mailing the same to him at Her Majesty's post office in St. Catharines, aforesaid, on the 1st October, 1876, directed to the defendant as Mr. William Gordon, Sunderland, that being the post office given by said defendant in his said original application, with the postage on said notice prepaid, and said notice embodied the number of defendant's said policy, the period over which the said assessment extended, the amount of said assessment and the time when and the place where payable. And the plaintiffs afterwards, to wit, on the 18th September, 1877, &c., (alleging a further assessment of sixty per cent. of the whole balance of the amount of the defendant's undertaking for losses, &c., incurred subsequent to the period for which said former assessment was made, and

alleging a similar notice as in said previous assessment.) And the plaintiffs aver that more than thirty days elapsed after the mailing of the said several notices of assessment before the bringing of this action. And all conditions were performed, &c., necessary to entitle the plaintiffs to maintain this action, yet the defendant has not paid the amount of the said assessments, or either of them, or any part thereof.

Eleventh plea: that after the issue of the said policy, and prior to the making of the said alleged losses and expenses, the property described in said policy was alienated by sale, whereby, pursuant to the provisions of said Act, passed in the 36th year of Her Majesty's reign, said policy became void; and thereupon the same was surrendered to the said company to be cancelled, and the defendant paid the said plaintiffs his proportion of all losses and expenses which had occurred prior to said alienation whereof then he became entitled to receive his said agreement from the plaintiffs, and the said plaintiffs retained said agreement, and assert the claim herein sued upon in fraud of the defendant.

To this plea the plaintiff demurred, on the ground, that the alienation by sale of the property described in the policy did not render the policy void, but voidable only at the option of the plaintiffs, and that unless the plaintiffs elected to avoid or cancel the policy the defendant remained liable to further assessments on his said premium note.

March 18, 1879. *MacKelcan*, Q. C., for the plaintiffs
J. E. Rose, for the defendant.

March 25, 1879. CAMERON, J.—The effect of section 41 of R. S. O. ch. 161, which declares, "In case any property real or personal is alienated by a sale, insolvency or otherwise, the policy shall be void, and shall be surrendered to the directors of the company to be cancelled, and thereupon the assured shall be entitled to receive his deposit note or notes upon payment of his proportion of all losses which have

accrued prior to such surrender," is to avoid the policy wholly as far as the assured is concerned, depriving him of a remedy against the company on the policy, and it equally enables him to relieve himself from liability on his premium or deposit note by surrender of the policy.

The plea demurred to sets up all that this section requires the assured to do, to discharge himself from liability as to all losses occurring subsequent to surrender of the policy, and avers payment of his portion of losses theretofore incurred.

The case of *Park v. Phœnix Ins. Co.*, 19 U. C. R. 110, is not an authority for the plaintiffs' contention, which must be determined on the effect of the above clause of the Act respecting Mutual Insurance Companies.

The judgment must therefore be entered for the defendant, with costs.

Judgment for defendant.

DIGEST OF CASES

REPORTED IN THIS VOLUME. •

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF COMMON PLEAS,

FROM EASTER TERM, 41 VICTORIA, TO HILARY TERM, 42 VICTORIA.

ACCIDENT.

Cause of.]—See INSURANCE, 5.

See LANDLORD AND TENANT, 1.

ACTION.

For unpaid purchase money—Receipt under seal.]—See ADMINISTRATION OF JUSTICE ACT, 1873.

For deceit.]—See FRAUDULENT MISREPRESENTATION—HUSBAND AND WIFE, 4.

Right of.]—See INSURANCE, 10.

By assignee of lease.]—See LANDLORD AND TENANT, 1.

Limitation of—Notice of.]—See WATER WORKS COMMISSION.

ADMINISTRATION OF JUSTICE ACT, 1873.

Action for unpaid purchase money—Receipt under seal—Equitable right to recover—A. J. Act 1873—Agreement—Evidence.]—In an action

against the defendant for unpaid purchase money on the sale of land, the deed thereof, as well as the receipt endorsed thereon, acknowledged the payment; but in an equitable defence, as also at the trial, the defendant admitted the non-payment thereof, but claimed that he was not liable to pay it because the plaintiff had agreed at time of the sale, and on the faith of which agreement the defendant purchased, to pay off a prior incumbrance, and that a covenant to that effect had been omitted by mistake: that the same had not been paid off by the plaintiff, but had been paid by the defendant; and the defendant prayed that the deed might be reformed by the insertion in the deed of such covenant.

Held, that notwithstanding the receipt under seal, the Court could entertain the plaintiff's claim as an equitable demand under sec. 2 of the Administration of Justice Act of 1873; but that the evidence, set out in the case, failed to establish the agreement relied on. *Parkinson v. Clendinning*, 13.

[This case has been affirmed on appeal.]

ADVERTISEMENT.

See ASSESSMENT AND TAXES.

AGE.

Of building insured—Warranty.]—See INSURANCE, 3.

AGENT.

Possession as.]—See LIMITATIONS, STATUTE OF.

AGREEMENT.

See CONTRACT.

ALIENATION.

Of insured property]—See INSURANCE, 10, 13.

ALLOTMENT.

Of stock—Evidence of.]—See CORPORATIONS, 2, 3.

ALTERATION.

Of agreement.]—See CONTRACT.

APPEAL.

Court equally divided—Rule discharged for purpose of appeal.]—See INSOLVENCY, 3—LIMITATIONS, STATUTE OF.

APPLICATION.

Condition in, but not in policy]—See INSURANCE, 8.

ARBITRATION.

See INSURANCE, 3.

ASSESSMENT.

Non-payment of—Effect of note given for.]—See INSURANCE, 9.

See INSURANCE, 13.

ASSESSMENT AND TAXES.

Advertisement—Taxes in arrear for three years—32 Vic. ch. 36, secs. 18, 128, 155.]—Held, under sec. 155 of 32 Vic. ch. 36, O., that it is not essential to give evidence of lands sold for taxes having been duly advertised, where the two years have elapsed after the execution of the tax deed without its being questioned.

On the 18th July, 1873, a warrant issued, and on the 18th of December following the land in question was sold for taxes imposed in 1870.

Held, that under sec. 18 of 32 Vic. ch. 36, O., which makes the taxes due on and from the 1st of January of the year in which they are imposed, the taxes for 1870 were due in that year for the first year, and consequently in 1872 for the third year, so that when the sale took place the taxes were due and in arrear for the third year, in accordance with sec. 128 of the Act.—*Wapels v. Ball*, 403.

ASSIGNMENT.

Equities arising.]—See DEBENTURES.

Action by assignee of lease on covenants to repair.]—See LANDLORD AND TENANT, 1.

AUDITORS.

County Board—Audit of—Conclusiveness of.]—See MUNICIPAL CORPORATIONS.

ATTORNEY AND SOLICITOR.

Bill of costs—Action on—Agreement that costs should not exceed a fixed amount—Reception of evidence—New trial.]—In an action on a bill of costs the question was, whether an agreement had been made by an attorney, the plaintiff, that the costs should not exceed a certain amount, which had been paid. The jury found the agreement to have been made, and gave a verdict for the defendant. A new trial was moved on the ground that evidence had been received and a discussion allowed to take place at the trial as to the magnitude of the bill, and of the large amount of costs paid by defendant in the same suit to other attorneys, which influenced the jury in their finding.

Held, GWYNNE, J. doubting, that this was not a sufficient ground for interference, the jury having been expressly told that the fact of the making of this agreement was the only question for their decision.—O'CONNOR v. McNAMEE, 237.

[This case has been affirmed on appeal.]

BARRISTERS CALLED.

245, 247, 448, 600.

BIGAMY.

Proof of prior marriage.]—See CRIMINAL LAW, 1.

BILL OF COSTS.

See ATTORNEY AND SOLICITOR.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Note made by wife to husband—Liability.]—See HUSBAND AND WIFE, 1.

Promissory note to insolvent—Action by endorsee—Right to recover.]—See INSOLVENCY, 2.

Assessment on premium note—Effect of note given for.]—See INSURANCE, 9.

See INSOLVENCY, 3.

BILLS OF SALE AND CHATTEL MORTGAGES.

Chattel mortgage—Verbal consent to sale—Property passing—Estoppel—Damages.]—A chattel mortgage contained a proviso that in case the mortgagor should attempt to sell, &c., the mortgaged goods, or any of them, without the mortgagee's written consent, the mortgagee might enter and take the goods. The mortgagor, without such written consent, sold a pair of horses, part of the mortgaged goods, to the plaintiff, when the defendant, the mortgagee, entered and took them, and after keeping them for four days he returned them to the plaintiff, who was not subsequently disturbed in his possession. The plaintiff having sued the defendant for the taking:

Held, that he was entitled to recover, for that the evidence, as set out in the case, shewed that the defendant either verbally consented to the sale or acted in such a manner as

estopped him from denying that the property passed to the plaintiff.

Bunker v. Emmany, 28 C. P. 438, distinguished.

Held, also, that the plaintiff could only recover damages for the four days' detention, and not for the value of the horses in addition.—*Loucks v. McSloy*, 54.

BOND.

Replevin.—See REPLEVIN.

BRIDGE.

Want of repair—Liability.—See WAYS, 2.

BUILDINGS.

Distance of—Warranty—See INSURANCE, 6.

BY-LAW.

Of township forming public school board — Validity.—See PUBLIC SCHOOLS.

Closing up road—Ingress and egress—Compensation.—See WAYS, 1.

CALLS.

On stock.—See CORPORATIONS, 1, 2, 3.

CARETAKER.

Possession as.—See LIMITATIONS, STATUTE OF.

CERTIFICATE.

For costs—Title to land in question.—See COSTS.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

COMPANY.

See CORPORATIONS.

COMPENSATION.

Closing up road.—See WAYS, 1.

COMPOSITION AND DISCHARGE.

See FRAUDULENT MISREPRESENTATION—INSOLVENCY, 1.

COMPUTATION OF TIME.

See CORPORATIONS, 1.

CONDITIONS.

Insurance.—See INSURANCE.

Statutory.—See INSURANCE, 3, 4, 7, 10, 11.

CONSTITUTIONAL LAW.

See PARLIAMENT.

CONTRACT.

Memorandum of agreement—Alteration—Evidence as to true agreement—Costs.—The plaintiff and defendants having actions respectively pending against one another, agreed to settle the same upon certain terms, the written memorandum whereof

stated that the plaintiff, in consideration of defendants' payment of \$1,150, and all costs of the two suits, discharged the defendants from the suit pending against them and all claims whatever, and concluded that it was distinctly understood that defendants should pay all costs incurred by the plaintiff for witness fees and disbursements in connection with the two suits. The defendants alleged that when the memorandum was drawn up there was inserted, after the words all costs of the two suits, the words, "except the lawyer's expenses of the said party of the first part," (the plaintiff): that these words had been struck out by the plaintiff or on his behalf after execution; and that under the agreement defendants could only be called upon to pay the witness fees and disbursements.

Held, on the evidence set out below, HAGARTY, C. J., dissenting, that the erasure took place prior to execution, but that the memorandum did not contain the true agreement of the parties, for that such agreement was that the plaintiff was to be paid all the costs of the two suits except the counsel fees. The plaintiff was therefore held entitled to such costs, which the Master was directed to tax, and for which the plaintiff was to have a verdict.—*Mason v. Burrows et al.*, 138.

Reformation of.]—See ADMINISTRATION OF JUSTICE ACT, 1873—DEED.

Costs not to exceed fixed amount.]—See ATTORNEY AND SOLICITOR.

Agreement to pay named sum for not buying goods—Liquidated damages or penalty.]—See LIQUIDATED DAMAGES.

Verbal for insurance—Interim receipts.]—See INSURANCE, 4.

Of hiring.]—See MASTER AND SERVANT.

Conveyance after marriage under prior parol agreement.]—See REGISTRATION.

Special—Property passing.]—See SALE OF GOODS.

See CORPORATIONS, 4—INSURANCE, 7.

CONVERSION.

See TROVER.

CONVEYANCE.

See DEED.

CORPORATIONS.

1. *Calls on stock—Computation of time.*]—Where calls on stock were to be made at "periods of not less than three months interval," and one call was made payable on the 10th of August and another on the 10th of November;

Held by the Court, affirming the judgment of GALT, J., that an interval of three months had not elapsed between the two calls, and that the second call was therefore bad.—*Stadacona Ins. Co. v. Mackenzie*, 10.

2. *R. W. Co.—Action by creditor against shareholders—Proof of defendant being a shareholder—Allotment—Parol evidence—Powers of provisional directors.*]—In an action against defendant as a shareholder of forty shares for unpaid stock in a R. W. Co. it appeared that the defendant signed the stock book, which was headed with an agreement by

the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares," they covenanted to pay the company ten per cent. of the amount of said shares and all future calls. The company subsequently passed a resolution instructing their secretary to issue allotment certificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificates, the one for the defendant representing that the company "in accordance with your application for forty shares," &c., "have allotted to you shares amounting to \$4000." The certificates were handed to the company's brokers to deliver to the shareholders. The company published a notice in a daily paper that these certificates were lying at their brokers, who were authorized to receive the ten per cent. The defendant went to the brokers and paid them ten per cent. upon the forty shares; and his name was thereupon entered upon the books of the company as the owner of forty shares, with a credit of ten per cent. as paid thereon, and he attended the first meeting of shareholders for the election of directors and seconded a resolution, which was carried, for the payment of the provisional directors for their services.

The defendant set also up that he was not a shareholder, because he signed the stock list on the faith of a parol agreement made with one of the provisional directors of the company, that unless he obtained a contract from the company he was not to become a shareholder, but the evidence shewed, not that the parol agreement made the obtaining of the contract a condition precedent to his becoming

a shareholder, but that defendant's intention and agreement was to become a shareholder forthwith on allotment, and the parol agreement was merely a collateral one, as to the effect of his status as a shareholder on his obtaining a contract at a future day.

Held, that the defendant was a shareholder, and liable to the plaintiffs under sec. 80 of the Railway Act, C. S. C. ch. 66; that the agreement formed no defence; and that being made with a provisional director it would not bind the company. —*Newman v. Ginty*, 34.

[This case has been affirmed on appeal.]

3. This case differed from the above case, in this, that the defendant never paid the ten per cent., and never called for or received any certificate of allotment for the fifty shares for which he subscribed, and he stated that he never had any notice of the allotment having been made to him.

The Court granted a new trial to enable it to be expressly found as a fact whether the defendant had received any sufficient notice of the company having accepted him as a shareholder, according to his subscription.—*Nasmith v. Manning*, 34.

4. *Agreement to pay for work in shares of a company—Validity of.*—The plaintiff performed certain work, amounting to \$465, for defendants, a joint stock company, incorporated under R. S. O. ch. 150, under an agreement for payment in shares of the capital stock of the company.

Held, that the agreement was not *ultra vires* of the company; and that the plaintiff's acceptance of the shares under such agreement would not render him liable to pay the

amount thereof to creditors of the company.

Held, also, that the plaintiff could not sue on an implied assumpsit to recover the value of the work so performed in money, unless it was shewn that the defendants were unable or had refused to deliver the shares.—*Inglis v. Wellington Hotel Co.*, 387.

See DEED, 3—MUNICIPAL CORPORATIONS.

CORRUPT PRACTICES.

At elections—Status of petitioner.]
—See PARLIAMENT, 2.

COSTS.

Title to land—Certificate—Practice.]
—To an action for negligently setting out fire, which spread to the plaintiff's land and damaged his woods, the defendant, amongst other pleas, pleaded that the land and property were not the plaintiff's. There was a verdict for the plaintiff with \$50 damages, but no certificate for costs.

Held, following *Humberstone v. Henderson*, 3 P. R. 40, that the plea raised the question of title to land, and that the plaintiff was therefore entitled to full costs without a certificate.

That decision, being upon a point of practice, was adhered to, though placing a constrution on our statute different from that put upon substantially similar language in the English Act.—*Coulson v. O'Connell*, 341.

Agreement that costs should not exceed fixed amount.]
—See ATTORNEY AND SOLICITOR.

See CONTRACT.

COUPONS.

See DEBENTURES.

COUNTY.

Board of auditors—Conclusiveness of audit.]
—See MUNICIPAL CORPORATIONS.

COURTS.

Court equally divided—Rule discharged for purpose of appeal.]
—See INSOLVENCY, 3—LIMITATIONS, STATUTE OF.

Provincial—Jurisdiction to entertain Dominion election petitions.]
—See PARLIAMENT, 1.

Sittings of court dispensed with—When motions for rules nisi to be made—Power of court.]
—See TRINITY TERM.

COVENANT.

See ADMINISTRATION OF JUSTICE ACT, 1873—LANDLORD AND TENANT, 1.

CRIMINAL LAW.

Bigamy—Proof of prior marriage.]
—On a trial for bigamy, in proof of an alleged prior marriage, a deed was produced executed by the prisoner, containing a recital of the prisoner having a wife and child in England, and conveying certain lands and premises to two trustees, in trust to receive and pay over the rents and profits to such wife and child; but with a power of revocation to the prisoner. B., one of the trustees, proved that at the time of the execution of the deed the prisoner informed

him that he had quarrelled with his present wife, and had a law suit with her: that the place had been bought with the first wife's money, and he wished it to go to her; and that he requested B. to act as trustee and to receive and pay over to them the rents and profits, but B. never paid anything over, nor had he ever written to or heard from such alleged wife.

Held, that this was not sufficient evidence to prove the alleged prior marriage.—*Regina v. Duff*, 255.

Murder—Evidence—Relevancy of.—On a trial for murder, the death of the deceased was shewn to have been caused by his being stabbed by a sharp instrument. It was proved that the prisoner struck the deceased, but neither a knife nor other instrument was seen in his hand. For the prisoner evidence was offered that on the day preceding the homicide, the prisoner had a knife which could not have inflicted the wound of which deceased died; and that on that day, the prisoner parted with it to a person who held it until after the crime was committed. The learned Judge at the trial refused to admit this evidence.

Held, GALT, J., dissenting, that the evidence was properly rejected.—*Regina v. Herod*, 428.

DAMAGES.

See *BILLS OF SALE AND CHATTEL MORTGAGES—DISTRESS—LIQUIDATED DAMAGES—REPLEVIN.*

DEBENTURES.

Coupons—Assignee—Equities arising—Recovery.—By sec. 13 of 34 Vic. ch. 47, D., the defendants' Act

of incorporation, they were empowered to issue bonds or debentures in such form and amount, and payable at such times and places as the directors might from time to time appoint, &c.; and by 35 Vic. ch. 12, sec. 2, O., the bonds or debentures of corporations made payable to bearer, or any person named therein as bearer, may be transmitted by delivery, and such transfer shall vest the property thereof in the holder, to enable him to maintain an action in his own name. The defendants issued bonds or debentures, with coupons attached for the payment of the interest half-yearly, payable to bearer, and delivered them to C. & Co., the contractors for the building of the road. The coupons for the first instalment of interest not having been paid, the plaintiff brought an action thereon, alleging an assignment to him, and that he was the lawful holder thereof.

Held, that the plaintiff held the coupons freed from any equities arising between the defendants and C. & Co. under an agreement creating a charge upon such instruments, and a plea setting up the forfeiture of such debentures under such agreement, was held bad.—*McKenzie v. Montreal, &c., R. W. Co.*, 333.

DECEIT.

Action for.—See *FRAUDULENT MISREPRESENTATION.—HUSBAND AND WIFE*, 4.

DEED.

1. *Mortgage—Delivery—Evidence.*—Under an agreement for the sale of land the defendant, on the execution to him of the deed thereof and removal of certain prior incum-

brances, was to give back a mortgage for the balance of the purchase money. The defendant by agreement went into possession, and afterwards executed a mortgage and left it with his solicitors, with, as he stated, express instructions not to deliver it over until he was satisfied that all was right, and assented to their doing so, and he alleged that without such approval or consent they filled in the date and delivered it over. In consequence of delay in removal of the incumbrances defendant claimed that the agreement was at an end and quitted possession, repudiating the delivery of the mortgage as being without his consent.

In an action by the plaintiff, assignee of the mortgage, on the covenant to pay the mortgage money.

Held, that the evidence, set out in the case, shewed that the defendant was fully cognizant of his solicitors' dealings in the matter, and had authorized their delivering the mortgage whenever they should deem it advisable to do so in defendant's interests, which it appeared they had fully protected; and that on the faith of the solicitors' acts the position of the parties was changed, namely, a conveyance executed vesting the title in the defendant and incumbrances removed, all of which took place before the defendant quitted possession. The plaintiff was therefore held entitled to recover.—*Leys v. Hollingshead*, 66.

2. *Agreement—Reformation—Evidence.*—The defendant applied to the plaintiffs to purchase from them 10,000 barrels of crude petroleum oil, for exportation; and the plaintiffs, at a meeting of their board at which defendant was present, passed a resolution accepting defendant's application for the purchase of the

said oil for exportation, and that he was not to offer any refined oil for sale up to 15th July, 1877, provided the London Oil Refining Company should make an arrangement with the plaintiffs and continue their monopoly till that date; this proviso being added at defendant's instance. An agreement under seal was then drawn up and executed by the parties, containing a stated sum as liquidated damages for a breach thereof, but omitting the above proviso.

The president of plaintiffs' company said, but the defendant denied, that he told the defendant at the meeting that the contract must be absolute, and that he, the president would not have signed it otherwise. He instructed the plaintiffs' solicitor to draw it without the proviso, and the defendant so executed it, believing, as he swore, that it contained the proviso, his attention not having been specially called to the omission. Afterwards the arrangement, which had been made with the London Oil Refining Company, was put an end to, and the monopoly ceased to exist.

In an action by the plaintiffs to recover the said damages for breach of the agreement, in selling crude oil in the Dominion:

Held, upon the above facts, and upon the evidence, set out in the case, that they could not recover; that the resolution, which had not been rescinded by any corporate act of the plaintiffs, must govern: that the defendant should have been informed of the omission; and that the defendant was entitled to have the instrument reformed by inserting the condition.—*Petrolia Crude Oil and Tanking Co. v. Englehart*, 157.

Lost deed, evidence of.—See EVIDENCE.

Conveyance after marriage under prior parol agreement—Unregistered title.—See REGISTRATION.

DELAY.

In prosecuting replevin—Action on replevin bond—Damages.—See REPLEVIN.

DEMURRER.

Judgment on.—See PLEADING.

DESCRIPTION.

See INSURANCE, 12.

DISCHARGE.

Composition]—See FRAUDULENT MISREPRESENTATION — INSOLVENCY, 1.

DISTRESS.

Excessive distress—Special damage—Seizure—What constitutes.—In an action for excessive distress the plaintiff may recover though no special damage be proved.

A bailiff, under a distress warrant, entered and made an inventory of "the several goods and chattels distrained by me, viz.; In front shop, quantity of millinery," &c., "together with sundry articles on the premises." The tenant then gave to the bailiff the following receipt: "I acknowledge to have received from G., bailiff, all the goods and chattels in house No. 113," &c., "seized for rent." &c., "to be delivered to him, the said bailiff, when demanded," &c.

Held, sufficient to constitute a distress executed.—*Black v. Coleman*, 507.

See LANDLORD AND TENANT, 2.

ELECTIONS.

See PARLIAMENT.

ENTRY.

Subsequent on land.—See LIMITATIONS, STATUTE OF.

ESTATE.

By entireties.—See HUSBAND AND WIFE, 3.

ESTOPPEL.

See BILLS OF SALE AND CHATTEL MORTGAGES — INSOLVENCY, 2—INSURANCE, 1, 2, 5.

EVIDENCE.

Lost deed — Evidence of.—In ejectment the plaintiff claimed under a deed from the patentee of the Crown to his father. The deed was not produced, but it was held that the evidence, set out in the case, was sufficient to prove its existence, and of its having been subsequently burnt.—*McCarthy v. Arbuckle*, 529.

Reception of.—See ATTORNEY AND SOLICITOR.

Onus of proof.—See INSURANCE, 5.

See ADMINISTRATION OF JUSTICE ACT, 1873—CONTRACT—CORPORATIONS, 2—CRIMINAL LAW—DEED—

INSOLVENCY, 3—INSURANCE, 5, 8—
LIMITATIONS, STATUTE OF—SALE OF
GOODS—TROVER—MEDICAL PROFES-
SION—WAYS, 2.

EXCESSIVE DISTRESS.

See DISTRESS.

EXECUTION.

See SCIRE FACIAS.

FALSE REPRESENTATION.

See HUSBAND AND WIFE, 4.

FRAUDULENT MISREPRESENTATION.

*Action for deceit—Inducing plain-
tiffs by fraud to accept composition—
Pleading.*—A declaration alleged
that the defendant was indebted to
the plaintiffs in a large sum of money,
to wit, &c., besides the costs of a
suit to recover same; and that de-
fendant fraudulently represented to
plaintiffs that he was insolvent and
unable to pay said indebtedness in
full, and thereby induced plaintiffs
to take a composition in respect of
said debt and costs, whereas defend-
ant was not insolvent, &c., whereby
plaintiffs lost the difference, &c., and
were put to costs in arranging the
composition.

Held, that it was no objection to
the declaration that it did not aver
that defendant knew that he was not
insolvent, because it charged the re-
presentation to be fraudulent; but
that the declaration was bad because
no damage was shewn; for if the

plaintiffs were induced to take a less
sum through defendant's fraud, the
original cause of action still existed,
and the plaintiffs could proceed with
their former action.—*Ontario Copper
Lightning Rod Co. v. Hewitt*, 491.

FURTHER INSURANCE.

See INSURANCE, 2.

GOODS.

Sale of.—*See* SALE OF GOODS.

HIGHWAYS.

See WAYS.

HIRING.

Contract of.—*See* MASTER AND
SERVANT.

HOUSE OF COMMONS.

See PARLIAMENT.

HUSBAND AND WIFE.

1. *C. S. U. C. ch. 73, sec. 2, con-
struction of.*—*Quere*, whether the C.
S. U. C. ch. 73 applies to personal
property acquired after 4th May,
1859, by a married woman who was
married prior thereto.—*Black v.
Coleman*, 507.

2. *Note made by wife to husband—
Liability.*—A married woman mar-
ried after the 2nd March, 1872, pos-
sessed of separate estate, and con-
tracting in reference thereto, made a
promissory note to her husband for

his accommodation, which the husband endorsed for value to the plaintiffs.

Held, that she was liable upon such note, but following *Lawson v. Laidlaw*, 3 App. 77, that the judgment must be a qualified one against her separate estate.—*Consolidated Bank v. Henderson*, 549.

3. *Lease to husband and wife—Acceptance by wife—Registry Act—Prior registration—Estate by entireties—Married Woman's Acts—Non-execution of lease—Term passing*].—S. S., the owner of certain land, agreed to convey the same to his son T. S., on his paying certain moneys for S. S., and forthwith granting a life-lease thereof to S. S. and his wife. The conveyance and lease were accordingly executed, the latter, containing, amongst others, covenants to be performed by the lessees, was executed by T. S. and S. S., but not by the wife. The lease was put on registry, but not the deed, which was proved to have been destroyed. Subsequently S. S. and T. S. joined in a mortgage of the land to the plaintiff, which was registered. The plaintiff, on enquiries made by him on finding the lease on record, obtained actual notice of the deed to T. S., but did not deem it of any importance, believing the transaction to have fallen through in consequence, as he understood, of the wife's repudiation during her husband's lifetime of the lease, and the destruction of the deed. After the death of S. S. the wife asserted her right to the life lease, and held possession of the land; and on the plaintiff bringing ejectment she defended in such right.

Held, that the plaintiff could not claim by reason of the non-registration of T. S.'s deed and the registration of the plaintiff's mortgage, be-

cause as he had actual notice of such prior deed the Registry Act would not apply; but even, if applicable, the plaintiff was bound by the prior registration of the life-lease.

Held, also, that the Married Woman's Acts did not affect this property conveyed to husband and wife, which by law they held by entireties: that a repudiation of the lease during coverture would not be binding on the wife, but that she might still assert her right thereto after her husband's death, as she in fact did; but that no such repudiation was proved, for the evidence at the most shewed that she merely objected to T. S. getting the land, and not to the lease.

Held, also, that the non-execution by the wife of the lease containing covenants to be performed by her did not render her incapable of taking thereunder, for that notwithstanding the term passed to her.—*Britton v. Knight et al.*, 567.

4. *False representation by wife—Action for.*]—A declaration alleged that the defendant, the wife of one K., by falsely and fraudulently representing to the plaintiff that she was authorized by her husband to order certain goods for her daughter's wedding outfit, and to pledge his credit therefor, induced the plaintiff to furnish the goods, and to charge the same to the husband; and that she had in fact no such authority, as was decided by the Court of Appeal, who gave judgment for the husband, reversing the judgment of the County Court in an action brought by the present plaintiff against the husband for the value of the goods, and his costs incurred in the County Court and in Appeal. The defendant pleaded coverture.

Held, plea good: that the Administration of Justice Act could not

assist the plaintiff, and that secs. 6, 20, of the Married Woman's Act, R. S. O. ch. 125, do not create any new liability against a married woman for her *torts or quasi torts*, but merely allow her to be sued alone, where formerly she could have been sued with her husband, and the authorities shewed that if so sued the action would have failed.—*Stone v. Knapp* 605.

Bigamy.]—See CRIMINAL LAW, 1.

Conveyance after marriage under prior parol agreement.]—See REGISTRATION.

IMPROVEMENTS.

Lien for.]—In this case the defendant claimed a lien for his improvements on the land: *Held*, that he was entitled to such improvements, as the evidence shewed that they were made under the belief that the land was his own.—*McCarthy v. Arbuckle*, 529.

INCUMBRANCES.

See INSURANCE, 8, 9.

INSOLVENCY.

1. *Omission of plaintiff's name in statement — Supplementary list — Composition and discharge — Necessity of assent of both partnership and individual creditors.*]—To an action of covenant contained in a mortgage the defendant pleaded a discharge in insolvency under a deed of composition and discharge, but to which the plaintiff was no party. Neither the plaintiff's name nor the debt were mentioned in the sworn statement

exhibited at the first meeting of creditors, nor was there any supplementary statement, as provided for by the Act, subsequently furnished containing any such reference, but it was urged that a couple of lists containing very indefinite references thereto, and furnished to the assignee prior to the meeting, and from which the sworn statement was made, might be deemed to be such supplementary statements.

Held, that they could not be so considered, and more especially so, as it appeared from the evidence that the plaintiff's name and debt had been intentionally omitted from the sworn statement.

Quære, whether in a deed of composition and discharge, where there are partnership and individual creditors, there must be a consent of the necessary number and value of each class to constitute a valid discharge.—*Sanderson v. Dixon*, 377.

2. *Promissory note to insolvent — Action by endorsee — Right to recover.*]

—The defendants, in ignorance of one P. being an undischarged insolvent, made a promissory note to him, which P. endorsed for value to the plaintiff, who was fully aware of P.'s insolvency. In an action by plaintiff against defendants:

Held, that he was entitled to recover.

Per WILSON, C.J., and GALT, J.—The maker of a note to an insolvent is presumed to guarantee his capacity to endorse it over, and in an action on the note by such endorsee, in the absence of intervention by the assignee, is estopped from denying his right to do so; and the endorsee's knowledge of the insolvency will not prevent such estoppel from applying.

Per GWYNNE, J.—The right to sue does not arise in such case on the

principle of estoppel, but because an undischarged insolvent, notwithstanding that the Insolvent Act vests all the after-acquired property and contracts in the assignee, has still an interest therein, in respect to which either he or his transferee may maintain an action against all the world except the assignee; and a defendant thus sued may protect himself against an after suit by the assignee by giving him notice of the action brought against him.—*Perkins v. Beckett et al*, 395.

3. *Money paid within thirty days of insolvency—Action to recover same—Personal liability—Evidence.*—A., carrying on business at St. Catharines, sold out his whole stock-in-trade and book debts, the purchasers assuming certain of the liabilities and paying an amount in cash. The sale was arranged and carried out by R., a creditor of A. and the father of one of the purchasers, into whose hands the purchase money was paid. A. was indebted to defendant in two notes given for goods purchased from defendant. These were paid by R. within thirty days of A. being declared insolvent, and out of the purchase money in R.'s hands. The payment was effected by drafts drawn by defendant on R., accepted by R., and discounted by defendant at a bank, to whom R. paid the amount thereof. The plaintiff, as assignee in insolvency of A.'s estate, sued defendant to recover back the moneys so paid him, and the learned Judge, who tried the case without a jury, found that defendant knew or had probable cause for believing that A. was insolvent. The defendant set up that the drafts were drawn and the money paid by R. under a personal undertaking by him contained in certain letters written to defendant.

The learned Judge at the trial found for the plaintiff, and on motion to enter the verdict for the defendant, it was:

Held, per WILSON, C. J., that the money was the insolvent's, and was received by defendant with knowledge of the insolvency, and was not paid under any personal obligation incurred by R.: that it made no difference that the money was received by defendant from the bank, and not from R. personally; and that the plaintiff should before action have restored to defendant the notes and R.'s acceptances, but that this should have been specially pleaded in defence.

Per GALT, J., that the money was paid in discharge of the personal obligation of R., who had no knowledge of A.'s insolvency, and might be deemed to be one of the liabilities assumed by the purchasers, and although the money might have formed part of the purchase money, that could not affect defendant, but was purely a matter between R. and A.

The Court being equally divided, the rule dropped, and the verdict stood; but for the purposes of appeal, the rule was directed to be discharged, without costs.—*Miller v. Reid*, 576.

See FRAUDULENT MISREPRESENTATION.

INSURABLE INTEREST.

See INSURANCE, 4.

INSURANCE.

1. *Mutual insurance—Subsequent erection of steam engine—Notice—Waiver—Estoppel*—36 Vic. ch. 44, O.]—In an action against defendants,

a mutual insurance company, on a policy against fire, averring a total loss, the defendants set up that the plaintiff, without the defendants' knowledge or consent, had erected a steam engine on the insured premises, thereby increasing the risk, and rendering the insurance void under 36 Vic. ch. 44, O. It appeared that when the engine was erected the plaintiff notified the defendants thereof, and applied for additional insurance, but on being informed that he must pay an increased premium he refused to do so: that he never received any notice of his policy being cancelled, or of his requiring to have a new policy at the increased rate, but nothing further was done nor any objections made until a month after the fire, when the objections now relied upon were raised: that after such erection, when, by the terms of the policy, the renewal premium became due, the plaintiff received notice thereof from the defendants' agent, to whom the renewal receipt had been sent from the head office, requesting the plaintiff to pay the same, which he did, and was given the receipt, and there was the same notice and payment of the next renewal premium. The defendants alleged that these notices were sent and the renewal premiums received by mistake.

Held, that under these circumstances, the defendants could not set up that the policy had been avoided. *Law v. Hand-in-Hand Mutual Ins. Co.*, 1.

2. *Further insurance—Estoppel.*—The plaintiff who was insured with the defendants, a mutual insurance company, for \$2,000, and in other companies with their assent for \$8,000, in all for \$10,000, on 4th July wrote to defendants notifying

them of changes he had made in his policies with other companies, with a list of the companies he was then insured in, to which defendants' secretary on the 7th of July replied that no such notice was necessary so long as the total amount of the insurance was not increased. In June or July defendants' inspector notified the plaintiff that defendants intended reducing his insurance with them by \$1,000, to which the plaintiff assented, informing them that he would replace the amount in some other company. On the 16th July the insurance was reduced and the unearned premium returned by the local agent, S., with whom the plaintiff effected an insurance for the \$1,000 in the Quebec Insurance Company, of which company S. was also agent.

Held, that under these circumstances the defendants could not set up that this was a further insurance without notice to them.—*Parsons v. Victoria Mutual Ins. Co.*, 22.

3. *Variations of conditions not complying with statute—Value and of building—Warranty—Reasonable conditions—Arbitration.*—Action on a policy of insurance for \$600, on a wooden building, alleging a total loss by fire. The policy contained the statutable conditions, and also what purported to be variations thereof, by which the insured was stated to warrant the truth of the statements as to the age and value of the building. The variations had not the notices required by the statute to be prefixed thereto, but all the conditions and variations were set out in the declaration as part of the contract. The plaintiff in his application and proof papers stated that the building was worth \$900 and its age 10 years, while the jury found such value and age to be \$300 and

19 years, respectively, but that the misrepresentations were not wilfully made. The defendants set up the breach of warranty and also fraudulent misrepresentation as to such value and age; and also that by one of the statutory conditions the value must be ascertained by arbitration.

Held, that the question of warranty did not arise, for no effect could be given to the variations, as they did not comply with the statute; and that the plaintiff should not be deprived of his objection thereto taken at *Nisi Prius* and in term, even though their appearance in the record was his own fault.

Quære, whether the conditions making the questions of value and age the subjects of warranty were not unreasonable.

The Court set the verdict aside, with liberty to the defendants to have a new trial if they desired to try the question of fraudulent misrepresentation with a view of avoiding the contract; but if they abandoned all defences but that of value, then there was to be an order of reference as required by the conditions.—*Sly v. Ottawa Agricultural Ins. Co.*, 28.

4. *Verbal agreement for—Interim receipts—Warehouse receipts—Insurable interest—Wool—Prior insurance.*—The plaintiff, a hardware merchant, as also a large wool buyer, discounted paper with his bankers for wool purchases on the security of warehouse receipts therefor, and at the same time he signed and delivered to the defendants' local agent, who was also the bank agent, applications for insurance on the wool to be held by the bank as further security. The agent either charged the plaintiff with the amount of the premiums in his bank account or received it in cash, but did not then fill in defendants'

printed form of interim receipt, or sign a written receipt or contract of any kind professing to bind the company, stating that he was too busy to do so. He informed the head office of the insurances, but not of the mode of effecting them, and after the loss remitted the amount of the premiums and wrote out and signed receipts, copying an old printed form. There was no evidence of any express authority to the agent to enter into verbal contracts, while the applications stated that the insurances were on the usual terms and conditions of the company. One of the conditions of defendants' policy was, that no receipt or acknowledgment of insurance should be binding, unless made by and on one of defendants' printed forms, and signed by their authorized agent. In an action on equitable grounds setting up insurances by the interim receipts,

Held, that the causes of action were not proved.

Held, also, that even if the policy should be deemed to be without conditions, the conditions endorsed not being in accordance with the statute, still these conditions might be looked at with reference to the agent's authority, as being a public declaration of defendants' proposed mode of dealing with the public.

Where warehouse receipts given on goods are transferred to a bank as collateral security for discounts.

Held, that the insured has still an insurable interest in the goods.

The policy sued upon was effected on large quantities of wool purchased during the wool season, and kept separate from the plaintiff's general stock in a warehouse called the wool house. A prior insurance in another company was on a general stock of goods, which included wool pickings, being small quantities purchased out

of the wool season and kept in the general storehouse.

Held, that this could not be deemed to cover wool purchased during the wool season.—*Parsons v. Queen Ins. Co.*, 188.

[This case has been affirmed on appeal.]

5. *Policy of insurance—Omission to seal—Equitable relief—Reformation—Estoppel—Suicide—Exposure to obvious danger—Cause of accident—Evidence.*—The Acts of Incorporation of the Sun Mutual and London Insurance Companies, required insurance contracts to be under seal and signed and countersigned as by the Acts directed. The policies in these cases were not under seal, but were signed and countersigned as required, and on the printed forms of policies issued by these companies for some years previously. The attestation clause of the Sun Company's policy acknowledged it to be under seal, while in the London Company it merely professed to be signed, &c.

Held, that under the circumstances, more fully set out in the case, the omission to affix seals must be deemed to be through mutual mistake; and that the plaintiffs were entitled to equitable relief, either by a reformation of the policies by the addition of seals, or by debarring the defendants from setting up such defence. An equitable replication setting up the facts, was therefore allowed to be added, and a new trial upon it was refused.

In these cases, which were on accident policies, the deceased was found dead in a cattle-guard on a railway, having been run over by a passing train. The cattle-guard was at the side of a street and near the end of the railway station platform, which extended to and adjoined the

street. There was no express evidence as to how deceased got into the cattle-guard. The defendants set up that, contrary to the terms of the policies, the death was occasioned by suicide or exposure to obvious and unnecessary danger, by the deceased attempting to cross over the street by walking on the track and then falling into the cattle-guard.

The jury both at this and a former trial having found against the defence of suicide, the Court, not being dissatisfied with the finding, refused to set aside the verdict, though the circumstances, stated in the report, were very peculiar and tended naturally to excite suspicion.

The proof of such a defence rests upon the defendants, and the evidence of it should be clear and convincing.

Held, also, that there was no evidence of any such exposure, for that it was equally consistent with the evidence that the deceased accidentally fell into the cattle-guard from the platform while walking along the platform; and, at all events, that the using of a track to cross a street was not the mode of walking thereon, against which prohibitions are levelling.

The policy also provided that the insurance was not to extend to mysterious disappearances, nor to any case of death, the nature, cause, or manner of which was unknown, or incapable of direct and positive proof.

Held, that this did not apply to cases where, as here, the immediate cause of death was indisputable, and evidenced by outward violence, but, as its context shewed, to mysterious disappearances, &c.—*Wright v. Sun Mutual Ins. Co.*, 221.

[This case has been argued in appeal, and stands for judgment.]

6. *Buildings within 100 feet—Warranty.*—To an action on a policy of insurance against fire on a stock of goods, defendants pleaded setting up a condition of the policy, that the application, survey, and diagram, and all things therein contained should be taken and considered as part of the policy, and that if the applicant should make an erroneous or untrue representation or statement therein, or omit to make known any fact material to the risk, the policy should be null and void, and averred a breach of warranty in stating that there were no buildings or premises within 100 feet of that containing the insured property other than those mentioned in the application survey, and diagram, whereas there were other buildings, describing them. The application contained twelve questions, none of which referred to the existence of buildings within 100 feet, which the applicant was required to answer and sign. Below the questions was a square space headed diagram, with a note on the north and west sides thereof, as follows: On the north: "Agents must write the word risk in red on the property proposed for insurance," &c. And on the west; "Use red ink for brick," &c. "Give all exposures within 100 feet, and mark distances between buildings." Below this space and at the foot of the application was the following: "It is hereby expressly agreed, declared and warranted, that each and every of the answers as above made is true, and that the same, and this application and survey, and the diagram of the premises herewith, shall be part of the insurance contract and the policy hereby applied for," and the basis of the company's liabilities; and then, after providing that in case the agent should fill in the ap-

plication he should for that purpose be the applicant's and not the company's agent, and for the case of the use of stoves, &c., it concluded, "And that the foregoing is a full, just, and true exposition of all facts and circumstances, condition, situation, and value of the property to be insured, so far as the same are material to the risk. Survey in all cases to be signed by applicant" and not by agent.

Held, that there was no such warranty as was set up, for that the application shewed that the only warranty was as to the answers to the questions submitted, none of which referred to the distance of buildings within 100 feet; that the applicant was only required to make known such buildings as were material to the risk, and it was proved that the buildings omitted were not of such a character.—*Wilson v. Standard Ins. Co.*, 308.

7. *Statutory conditions—Act relating to—Construction of—Agreement as to payment of premium—New trial.*—One of the conditions endorsed on a policy, being No. 3, provided that no insurance, whether original or continued, should be considered as binding until the actual payment of the premium.

Held, that even if this could not be set up as a condition, not being one of the statutory conditions or a variation thereof, it might still be relied upon as an agreement of the parties which went to the foundation of the contract, and denied that the insurance ever came into existence.

Semble, per Gwynne, J., dissenting from *v. Ulrich National Ins. Co.*, 42 U. C. R. 141, and *Frey v. Mutual Ins. Co. of Wellington*, 43 U. C. R. 102, that the proper construction of "The Insurance Policy Act of

1876," was that the statutory conditions are to be adjudged and regarded as part of every policy, whether printed thereon as directed by the Act, or not, unless varied in the manner thereby prescribed.

In a declaration on a fire policy the policy was alleged to be subject to the conditions endorsed on the policy—not being the statutory conditions—which were set out in full, amongst which was No. 3, as above. The defendant pleaded on equitable grounds a second plea, that in and by said policy (and the conditions endorsed thereon and set out in the declaration) setting up the above provision, and alleging non-payment, upon which issue was joined. The learned Judge at the trial, on the authority of the cases above referred to, struck out the conditions from the declaration, as also the part between the brackets from the second plea, and upon this being done was of opinion that the declaration must be read as setting up a policy under seal which acknowledged the payment of the premium, and contained an unconditional covenant for the payment of the amount insured, and that the issue joined on the second plea must be found for the plaintiff, for whom he entered a verdict.

The Court directed the record to be restored to its former state, or so far as was necessary to enable the issue which had been joined between the parties as to the nonpayment of the premium to be tried as joined.—*Geraldi v. Provincial Ins. Co.*, 321.

8. *Title—Incumbrances—Condition in application, but not in policy—Evidence.*—In an action on a policy of insurance against fire on a frame building, the defendants pleaded that by a condition of the policy the application was made a part and

condition of the insurance contract, and that by said application the plaintiff covenanted that the same was a just, full, and true exposition of all the facts and circumstances, so far as known to the applicant and material to the risk, and that the plaintiff falsely and fraudulently represented that he was the owner of the land on which the insured property was situate, and that no other person had an interest therein, whereas he was not such owner, which were facts material to be known to the defendants and to the risk, whereby the insurance was not in force. The defence was based on the answers to the questions: 1. "State the nature of your title, whether fee simple," &c. "If others are interested, give name, interest, and value." Answer. "Owner." 2. "What incumbrance, if any, is now on said property"? Answer. "\$60 balance of payment, to be paid in four years." It appeared that the applicant purchased the land from a minor for \$60, to be paid for, and the deed to be given in four years, when the minor became of age: and that the house was so built as to be capable of removal; and it was admitted that all these facts were known to the defendants' agent when he took the application. There was no condition on the policy making the application a part and condition of the insurance contract, but it was urged that because by the terms of the application it was expressly so made the condition therein contained, as alleged in the plea, could be so set up.

Held, that the plea was not so pleaded as to enable the defendants to take advantage of the condition relied upon.

Held, also, that the plea was in fact disproved, for that the plaintiff's title and interest, as also the incum-

branches, were communicated according to the truth, in that the plaintiff was the owner of the house, and in a sense also of the land under the agreement for the purchase thereof, and that there was an incumbrance of \$60.—*Brogan v. Manufacturers, &c, Mutual Ins Co.*, 414.

9. *Incumbrance — Misrepresentation—Assessment—Non-payment of—Effect of note given for—*36 Vic. ch. 44, sec. 44, O.]—In an application, dated 1st March, 1876, for insurance in a mutual company for \$500 on a saw mill, in answer to the question: "Incumbrances. Is the property mortgaged? If so, state the amount. Is there any insurance by the mortgagee?" the applicant answered, "Yes, \$500 mortgage. In case of loss payable to McG. as interest may appear," without mentioning another mortgage for \$1,000 on the property. This application was one of three applications made at the same time, and forming one transaction, and though each was on different buildings all were on the same piece of land, $4\frac{3}{4}$ acres. In one of such other applications, in answer to the question, "What incumbrance, if any, is now on said property?" the answer was, "\$1,500 mortgage on this and saw mill property, all insured in this company; 1st of March application takes effect on saw mill."

Held, under these circumstances, there was no misrepresentation as to incumbrances, and that the company had notice in writing of the truth with regard to them, by means of the two applications, which referred to each other.

For an assessment made on the premium note, the insured, at the request of the company's secretary, gave a note at two months, signed

by himself and one L., which the secretary stated would be accepted as payment, and in the company's register the assessment was entered as paid by this note. The note was not paid at maturity, in consequence of which the company refused to pay the loss:

Held, that under sec. 44 of the Mutual Insurance Companies Act, 36 Vic. ch. 44, O., the note could only be deemed as suspending the debt during its currency, and therefore its non-payment at maturity avoided the insurance.—*McGugan v. Manufacturers, &c., Mutual Ins. Co.*, 494.

10. *Alienation of property—Conditions of policy—Interim receipts—Part of loss payable to creditors—Right of action—Parties to suit—Releases.*]—On the 19th of November, 1877, an interim receipt on a stock of goods, was made to plaintiff, subject to the conditions of the defendants' printed form of policy then in use, being the statutory conditions, one of which was that "if the property insured is assigned without the written permission endorsed thereon of the agent of the company duly authorized for such purpose the policy shall hereby become void." On the 28th of November the plaintiff assigned the insured property to one McK., in trust, to sell the same and pay the plaintiffs' creditors, among whom were McK. and McM. & Co., the amounts due them, and the residue, if any, to the plaintiff. By the policy which was dated 12th of December, but which was not delivered to the plaintiff until after the fire, which occurred on the 15th of January, 1878, the loss, if any, was to be paid to McK. and McM. & Co., and others as creditors, as their interest might appear. When

the assignment was made the defendants' agent who issued the receipt was expressly notified thereof, and assented thereto, and stated that no notice to the company was necessary as the policy was payable to the assignees. The plaintiff sued on the policy, setting it out, as also the assignment, and alleged that after satisfying the creditors' claims there would be a surplus coming to him, and that he sued as trustee for the creditors, and in his own interest.

Held, that the policy must be deemed, in the absence of evidence to the contrary, to be the form of policy in use when the receipt was given, it having been accepted by the plaintiff and the action brought thereon.

Held, also, that under the condition there should have been a consent in writing to the assignment even if endorsement thereof on the receipt was not essential; that the agent who issued the receipt had the power to dispense with such written consent, and that he had done so,

Held, also, that the creditors should have been made parties with the plaintiff, but that this might be dispensed with by obtaining releases of their claims; and a verdict was directed for the plaintiff for the whole amount insured on the production of such releases to the Master.

A temporary insurance by means of an interim receipt is not within the R. S. O. ch. 162, and may be subject to such conditions as the parties agree upon. — *McQueen v. Phoenix Mutual Ins. Co.*, 511.

[This case has been reversed on appeal.]

11. *Value—Misrepresentation.*—No 1, of the statutory conditions endorsed on a policy of insurance

provided that, "if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force in respect of property in regard to which the misrepresentation or omission is made." In an application for insurance on a building the plaintiff stated its estimated cash value to be \$900, and obtained an insurance for \$600. The jury found that the actual cash value was \$450, but that his estimate was made in good faith, and that he had not been guilty of any fraud or misrepresentation.

Held, that under the above condition it was immaterial whether a representation of any fact material to be made known to the defendants to enable them to judge of the risk, was falsely (*i. e.*, untrue to the knowledge of the person in making it) or fraudulently made, so long as it was in fact untrue; and that the question of value being such a material fact, and the representation relating thereto being untrue, the policy was avoided.—*Sly v. Ottawa Agricultural Ins Co.*, 557.

12. *Sale of liquor on premises—Warranty*—36 Vic. ch. 44, secs. 32, 36, O.—*Statutory conditions—Renewal of policy.*—In a policy of insurance effected by the plaintiff for a year in a mutual company, the premises insured were described as a two story brick building, &c., occupied as a tenement dwelling. By a memorandum afterwards endorsed on the policy the building was allowed to

be "occupied as a refreshment room, no liquor sold." Afterwards the policy was renewed by a renewal receipt issued under sec. 32 of the Mutual Insurance Act, 36 Vic. ch. 44, O. The building was occupied by a tenant of the plaintiff, and it was proved that liquor was sold in the building by the occupant, but without the knowledge or consent of the insured. The defendants set up in their pleas a condition of the policy that if the hazard was increased by any means within the knowledge of the assured without the defendants' consent, the policy should be void; and alleged that liquor was sold to the knowledge of the insured, and without the company's consent, whereby the hazard was increased. The conditions endorsed on the policy did not comply with the Act respecting statutory conditions which were in force when the policy was renewed.

Held, that although under sec. 36 of the Mutual Act, which required policies to be under the corporate seal, the endorsement when made, being after the execution of the policy, might not then be deemed a part thereof, it became so on the renewal authorized by sec. 32 of the Act, so as to cause the policy to be avoided for the unauthorized sale of liquor on the premises.

Per WILSON, C. J.—Even if the condition set out in the pleas was not binding on insured, as not in accordance with the statute, the defendants might set up, under sec. 40 of the Mutual Act, that the risk was increased after the insurance was effected by reason of the sale of liquor (such section not making the knowledge of the insured essential), whereby the policy was avoided; and the pleas might be amended accordingly.

Per GALT, J.—The effect of the memorandum was to alter the description so as to include the provision as to the sale of liquor in such description, and being a matter of description it was binding as a warranty, and there being a breach thereof the policy was avoided.—*Gauthier v. Canadian Mutual Ins. Co.*, 593.

13. *Mutual insurance—Alienation of insured property—Liability on premium note for subsequent losses—R. S. O. ch. 161, sec. 41.*—Sec. 41 of R. S. O. ch. 161, provides that "in case any property real or personal is alienated by sale," &c., "the policy shall be void, and shall be surrendered to the directors of the company to be cancelled, and thereupon the assured shall be entitled to receive his deposit note or notes upon payment of his proportion of all losses which have accrued prior to such surrender."

Held, that under this section the said alienation avoided the policy wholly, so as to deprive the assured of any remedy thereon, and enabled him, upon payment of all prior losses and surrendering the policy to be cancelled, to relieve himself from further liability to assessment on his premium note.—*Niagara District Mutual Ins. Co. v. Gordon*, 611.

INTEREST.

C. L. P. Act, R. S. O. ch. 50, sec. 267, sub-sec. 2.—Under sec. 267, sub-sec. 2, of the C. L. P. Act, R. S. O. ch. 50, where a claim is payable otherwise than by a written contract, interest may be allowed from the date of a demand therefor in writing.

Where interest was claimed on a

sum of \$96, admitted to be due before action commenced, for extra work and materials furnished by the plaintiff, but not under a written contract, and no demand of interest was proved :

Held, that the claim for interest could not be allowed.—*Inglis v. Wellington Hotel Co.*, 387.

INTERIM RECEIPTS.

See INSURANCE, 4, 10.

JUDGES.

Appointment of, 248, 449.

JUDGMENT.

On demurrer.—*See* PLEADING.

JURISDICTION.

Of Provincial courts to entertain Dominion election petitions.—*See* PARLIAMENT.

By-law of township council forming public school board.—*See* PUBLIC SCHOOLS.

JURY.

Discharge of during trial—Practice—Waiver.—*See* TRIAL.

LAND.

Title to—Certificate for costs—Practice.—*See* COSTS.

Sale of.—*See* SALE OF LAND.

Assets quando acciderint.—*See* SCIRE FACIAS.

LANDLORD AND TENANT.

1. *Lease—Covenants to repair generally and after notice*—“*Accident by tempest*”—*Action by assignee—Continuing breach.*—A lease of a wharf or pier, for eight years, dated 7th May, 1874, contained covenants by the defendants, the lessees, to repair generally, “reasonable wear and tear, and accidents by fire and tempest, excepted;” and to repair after notice in writing, but without the above exceptions. In May, 1876, the wharf was damaged by the action of the ice forced against it by a high wind. In July, 1876, the demised premises were sold to the plaintiff under an execution against the lessors, and a deed thereof executed by the sheriff in July; and in November the plaintiff gave a written notice to repair the damage caused as aforesaid. In an action by the plaintiff against the defendants for the breach of the covenants to repair generally and after notice.

Held, that the non-repair was a continuing breach of the covenants to repair, of which the plaintiff, as assignee, might avail himself.

Held, also, that the covenant to repair after notice was subject to the same exceptions as were contained in the general covenant.

Held, also, that the damage here sustained could not be said to be an accident caused by tempest, so as to bring it within the exception.—*Thistle v. Union Forwarding and R. W. Co.*, 76.

2. *Rent to become due on removal of goods—Distress.*—Under a proviso in a lease, on the tenant commencing to remove the goods from the demised premises the then current year’s rent immediately became due and in arrear. On 31st October,

on the tenant proceeding to sell and dispose of all the goods on the demised premises, with the intention of finally quitting the place before the 21st November following, when the rent became due and the lease terminated, the landlord entered and distrained.

Held, that under the terms of the proviso the current year's rent became due and in arrear, and the distress was therefore legal.

Griffith v. Brown, 21 C. P. 12, and *Re Hoskins*, 1 App. 379, distinguished, as being between the landlord and persons claiming under the insolvency, whereas here it was directly between the landlord and tenant, the parties to the contract.

It appeared that the lease was not executed by the plaintiff, but by his brother alone, but that they were both jointly interested, and that the plaintiff treated himself as tenant.

Held, that under these circumstances the plaintiff must be deemed to be such tenant, and subject to the terms of the lease.—*Young v. Smith* 109.

See DISTRESS — HUSBAND AND WIFE, 3.

LEASE.

See LANDLORD AND TENANT.

LICENSE.

Action for price of liquors.]—See SALE OF GOODS, 1.

LIEN.

For improvements.]—See IMPROVEMENTS.

LIMITATIONS, STATUTE OF.

Possession as caretaker or agent—Subsequent entry of owner—Tenancy at will—Evidence.]—The plaintiff's father, who lived in the township of Tecumseh, owned a block of 400 acres of land, consisting respectively of lots 1 in the 13th and 14th concessions of the township of Wellesley. In 1849, the father offered the plaintiff his choice of 100 acres of the block, if he would go and live on it, and take care of the rest of the block for him. The plaintiff agreed to this, and selected the south half of lot 1 in the 13th concession, and lived thereon, taking care of the residue of the block. In November, 1864, the plaintiff sold his 100 acres, and in December following, having to give up possession to the purchaser, moved on to the north half of this lot 1, where he had resided ever since. In January, 1877, the father died, having, by his will, devised the north half of this north half to the defendant, another son, and the south half of this same north half to the plaintiff. The defendant, claiming such north half of the north half under the devise to him, entered upon it, whereupon the plaintiff brought trespass, claiming title thereto by possession. The learned Judge at the trial found that the plaintiff entered into possession, and so continued, merely as his father's caretaker and agent, and he entered a verdict for the defendant. Evidence was also given, and is set out in the report, which, it was urged, shewed an entry on the land within the last seven years, and thereby created a new starting point for the statute, and a new tenancy at will, but there was no finding on this point. On motion to enter a verdict for the plaintiff, *Per WILSON, C. J.*, the evidence

shewed that the plaintiff was in possession, claiming adversely to, and not as caretaker and agent of his father; and the subsequent entry was not proved.

Per GALT, J., the evidence established the subsequent entry, and the creation of a new tenancy at will within ten years.

The Court being equally divided, the rule dropped, and the verdict stood; but to enable the case to be appealed, the rule was directed to be discharged.—*Ryan v. Ryan*, 449.

[This case has been argued in appeal, and stands for judgment.]

Limitation of action.—See WATER WORKS COMMISSION.

LIQUIDATED DAMAGES

Agreement to pay a named sum for not buying goods—Liquidated damages or penalty.—Declaration: in substance that the defendant agreed under seal, to manufacture into pot barley, and to store for plaintiffs certain barley of the plaintiffs, on or before the 15th of July, 1878, and on said date to purchase said barley and pay therefor the sum of \$785; that it was further provided, that in case defendant did not pay the said sum of \$785 on the said date, defendant should pay the plaintiffs the sum of \$100 as liquidated damages. Breach, nonpayment of the \$100. The defendant demurred, on the ground that the \$100 claimed as liquidated damages was in fact a penalty, and could not be recovered.

Held, that the declaration was good. 1. That this question could not properly be raised by demurrer, for the plaintiffs were entitled to some damages; and 2, that the \$100 was not a penal sum or forfeiture for

not paying money due, or for any ordinary debt or claim, but liquidated or agreed on damages for not buying at a named price goods of a fluctuating and uncertain value.—*Knowlton et al. v. Mackay*, 601.

LIQUORS.

Sale of on insured premises—Breach of warranty.—See INSURANCE, 12.

Action for price of—License.—See SALE OF GOODS, 1.

MALPRACTICE.

Surgeon—Negligence.—See MEDICAL PROFESSION.

MARRIAGE.

Proof of—Bigamy.—See CRIMINAL LAW, 1.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

Contract of hiring—Construction.—On 27th November, 1873, the plaintiff, who resided at Toronto, wrote to the president of the defendants' company at Montreal suggesting their entering into the marine business, and offering his services as manager; and on receiving a favourable reply asking what salary he would require, on the 16th December, he wrote stating that he would accept a named sum, and was willing

to enter into an engagement for three or five years. On 19th December, the defendants replied stating that they agreed to pay the salary named, "The engagement to be for a period of not less than three years," to which the plaintiff replied accepting the salary and appointment. The correspondence shewed that the plaintiff's duty was to be at Montreal, at which place the plaintiff was to reside, and that the business usually commenced early in the year, at which time the plaintiff suggested their commencing it, and stating that he would then be prepared to begin, and would be down soon after New Year's.

Held, that the proper construction of the correspondence was, that the contract was for three years, and to commence from the beginning of the following year, namely, 1st January, 1874; and that the fact of the plaintiff being paid for a month's services rendered in Toronto at the request of the defendants' manager prior to that date, on the basis of the salary agreed upon, could not have the effect of making the contract commence from the first of such prior month, especially when it might reasonably be inferred from the evidence that such services were performed, not under the contract, but with a view of getting it.—*Fortier v. Royal Canadian Ins. Co.*, 353.

MEDICAL PROFESSION.

Surgeon—Malpractice—Negligence—Evidence—Nonsuit.—In an action against a surgeon for malpractice, one of the medical men called for the plaintiff stated, though not in terms condemning defendant's treatment or alleging negligence therein,

that he would have pursued a different course; but the weight of evidence shewed clearly that the course of treatment pursued by the defendant was such as would have been adopted by medical men of competent skill and good standing in the profession:

Held, that there was no evidence of negligence to submit to the jury, and a nonsuit was entered.—*Fields v. Rutherford et al*, 113.

MEMORANDA.

245, 247, 248, 448, 600.

MISREPRESENTATION.

See INSURANCE, 9, 11.

MISTAKE.

See INSURANCE, 5—MUNICIPAL CORPORATIONS.

MORTGAGE.

Sale of land subject to mortgage.—In 1856, C. mortgaged some ten acres of land to H. for £2,000, and H. covenanted, on request by C. or his assigns, and on payment of a specified rate per acre, to release any portions of said land. Subsequently C. sub-divided the land into a number of small lots, and on the 2nd of January, 1857, sold two of these lots to defendant for £93 15s., C. agreeing to pay off and indemnify and save harmless the defendant from the mortgage to H. The defendant paid £20 down, which C. agreed to apply on the mortgage, but never did, and

defendant gave back a mortgage to C. for £73 15s., the balance of the purchase money. In February, 1857, C. assigned defendant's and six similar mortgages to one H. as collateral security for two promissory notes made by C. for £100 each, payable at four and eight months respectively, on payment whereof the mortgages were to be given up; and, so far as appeared, these notes might have been paid. C. not having paid any of the principal money of H.'s mortgage, on the 20th of January, 1866, executed an indenture, whereby after reciting such non-payment of said principal money, &c., he, in consideration of his discharge from the mortgage indebtedness, released all his equity of redemption and estate in the mortgaged premises to the executors and trustees of the will of H., who had since died, the indenture being declared to be made under the Act entitling mortgagees to receive such release without merging the mortgage debt, and that it was only to operate as a release of such debt against C., and not against said lands or subsequent incumbrances. On the 10th of January, 1867, by an indenture, which, after reciting C.'s mortgage to H. and his said covenant therein, and a Chancery suit in which the Court had directed a sale of C.'s mortgage upon which said principal was due as aforesaid, the said trustees, by the conveyance, the terms of which were settled by the parties, in consideration of \$100, granted and conveyed to S., his heirs and assigns, the defendant's and forty-three similar lots in which the equity of redemption had been sold by C. as aforesaid, subject to such equity of redemption as was then subsisting therein; and the said trustees did thereby purport to assign to S. the mortgage debt and

interest payable and chargeable on said lots under H.'s covenant and all benefit therefrom; and for better enabling S. to recover such portions from C. or any persons entitled to pay the same, they appointed him their attorney. S. then conveyed to one Chambers, and Chambers's personal representatives conveyed to H. In an action by plaintiff as assignee of H. of the defendant's covenant in his mortgage to C. to pay the £73 15s.:

Held, that after the execution of the indenture of the 20th February, 1866, C. would not, in equity, be permitted to recover, and the plaintiff, claiming as his assignee, could be in no better position; and that the subsequent conveyance did not confer any new right.—*Campbell v. Spurgeon*, 86.

See DEED.

MUNICIPAL CORPORATIONS.

County Board of auditors—Audit of—conclusiveness of—Pleading.].—To an action for the recovery of fees for services connected with the administration of justice within defendants' county, claimed to have been rendered by the plaintiff as sheriff, alleging that such fees had been duly audited by the county board of auditors under the statute, whereby plaintiff became entitled to receive payment of the same, the defendant pleaded on equitable grounds, setting up that the right to such fees had been disputed, and submitted to this Court by a special case, and that the alleged audit was made under a misconception of the judgment which the auditors erroneously understood to decide that the plaintiff was enti-

tled to such fees, whereas the decision was to the contrary.

Held, by CAMERON, J., plea good, for that such audit was not conclusive, but that the circumstance under which it was made might be shewn.—*Reynolds v. Corporation of Ontario*, 488.

[This case has been reheard before the full Court, and the judgment affirmed.]

See WATERWORKS COMMISSION.

MURDER

Evidence—Relevancy.—See CRIMINAL LAW, 2.

MUTUAL INSURANCE.

See INSURANCE.

NEGLIGENCE.

Surgeon—Malpractice.—See MEDICAL PROFESSION.

NEW TRIAL.

Reception of evidence.—See ATTORNEY AND SOLICITOR.

See CORPORATIONS, 3—INSURANCE, 3, 5, 7.

NONSUIT.

See MEDICAL PROFESSION.

NOTICE.

See INSURANCE, 1, 2.

NOTICE OF ACTION.

See WATER WORKS COMMISSION.

OWNER.

Meaning of.—See INSURANCE, 8.

Subsequent entry of on land.—See LIMITATIONS, STATUTE OF.

PARLIAMENT.

1. *Dominion election petitions—Jurisdiction of Provincial Courts to entertain—Procedure—37 Vic. ch. 10, D—Ultra vires.*—*Held*, that the 37 Vic. ch. 10, D., by which the trial of controverted elections to the House of Commons was referred to the Court of Common Pleas, or any Judges thereof, amongst the other Courts named in this Province, was not *ultra vires* of the Dominion Parliament; and a preliminary objection raising this question was disallowed with costs.

Held, also, WILSON, C. J. dissenting, that the Dominion Parliament had power to enact the procedure to govern the Courts in relation to such trials, and that the Act 37 Vic. ch. 10, D., in this respect also was not *ultra vires*. A preliminary objection raising this question was therefore in like manner disallowed.

Per WILSON, C. J., that there was no power to enact such procedure, and that the Court not having any procedure of its own applicable, the petition should be removed from the files.

Semble, *per* WILSON, C. J., that under R. S. O. ch. 49, sec. 45, the Court might have framed rules adopting the procedure in question,

which if done might be applicable to future petitions; and that the Provincial Legislature could adopt such procedure, as if it had been originally enacted by such Legislature, or established by the Courts under their inherent or statutory jurisdiction.

Semble, per GWYNNE, J., that the questions raised were not the proper subject of preliminary objections.—*Re Niagara Election Case*, 261.

2. *Corrupt practices—Status of petitioner.*—As preliminary objections to an election petition, it was alleged in substance that the petitioner, who was a voter at said election, could not be a petitioner, because he had been guilty of corrupt practices at the election of members of the House of Commons within eight years before, and at the election complained of.

Held, that the objections must be disallowed, for that under the 37 Vic. ch. 9, sec. 104, D., no disqualification arises until after the person has been found guilty, *i.e.*, after conviction.—*Re South Huron Election Case*, 301.

PAROL EVIDENCE.

See EVIDENCE.

PARTIES.

See INSURANCE, 10.

PARTNERSHIP.

Sale after dissolution—Validity of.—G. D. and A. D., who were in partnership as bakers, purchased some wheat for their business, but not being of the required quality, it

was not used by them. On January 28th, 1876, the partnership was dissolved by an instrument under seal, G. D. giving A. D. \$165 in cash and a note for \$500, retaining the assets and continuing the business. On March 14th A. D., on the ground of his being a minor, and not bound by the terms of the dissolution, filed a bill in Chancery by his next friend for a partnership account. On March 16th, being after the dissolution, G. D., to meet existing demands against the partnership, and to convert the assets into money for the benefit of the partners, *bona fide* sold the wheat for value to the plaintiff, who was aware of the dissolution, but not of the Chancery proceedings.

Held, that the sale was valid.

The defendant who held the wheat in store for the firm, on receiving a delivery order signed by G. D., undertook to hold the wheat for the plaintiff, and negotiated with him for the purchase of it, but afterwards repudiated the plaintiff's title on being indemnified for A. D., and refused to give the wheat up to the plaintiff.

Semble, that the defendant, after what he had done, could not be permitted to set up A. D.'s title against the plaintiff.—*Murphy v. Yeomans*, 421.

Necessity of partnership and individual creditors to composition and discharge.—*See* INSOLVENCY, 1.

PENALTY.

See LIQUIDATED DAMAGES.

PERSONAL LIABILITY.

See INSOLVENCY, 3.

PETITIONS.

Election.—See PARLIAMENT.

PLEADING.

Judgment on demurrer.—Judgment should not be given against a demurrer by a defendant by reason of his failure to appear in support of it. The judgment must either be against the defendant by default, or it must be argued, and judgment given on the merits.—*Consolidated Bank v. Henderson*, 549.

Action for price of liquors—Plea that liquors furnished without license.—See SALE OF GOODS, 1.

See ADMINISTRATION OF JUSTICE ACT, 1873—FRAUDULENT MISREPRESENTATION—HUSBAND AND WIFE, 4—INSURANCE, 5, 8—MUNICIPAL CORPORATIONS.

POSSESSION.

See LIMITATIONS, STATUTE OF.

PRACTICE.

Discharge of jury during trial—Waiver.—See JURY.

Court equally divided—Rule discharged for purposes of appeal.—See INSOLVENCY, 3—LIMITATIONS, STATUTE OF.

See COSTS.

PRELIMINARY OBJECTIONS

To election petitions.—See PARLIAMENT.

PREMIUM.

For insurance—Agreement as to payment of.—See INSURANCE, 7.

PREMIUM NOTE.

See INSURANCE, 13.

PRIOR INSURANCE.

See INSURANCE, 4.

PROCEDURE.

See PARLIAMENT, 1.

PROPERTY PASSING.

See BILLS OF SALE AND CHATTEL MORTGAGES—SALE OF GOODS, 2.

PROVISIONAL DIRECTORS.

Powers of.—See CORPORATIONS, 2.

PROVINCIAL COURTS.

Jurisdiction to entertain Dominion election petitions.—See PARLIAMENT, 1.

PURCHASE MONEY.

Action for unpaid—Receipt under seal—Equitable right to recover.—See ADMINISTRATION OF JUSTICE ACT, 1873.

PUBLIC SCHOOLS.

*Township by-law forming public school board—Validity—Effect on portion united to village—Two-thirds majority—*37 Vic. ch. 28, sec. 48, O., 40 Vic. ch. 16, sec. 6, subsecs. 1, 7, O.]—On the 1st of January, 1875, Bracebridge, hitherto forming part of the township of Macaulay, was incorporated as a village. At the time of incorporation Bracebridge and a portion of the township, being the territory in dispute, formed school section No. 1, Macaulay, which on incorporation became the Bracebridge section, the school house being in Bracebridge. In October, 1875, the township of Macaulay, on petition of two-thirds majority of the township sections, not counting the territory in dispute, passed a by-law, under section 48, of 37 Vic. ch. 28, O., abolishing the division of the township into sections, and forming a public school board for the township for the management of all the schools therein, and promptly after the passing thereof the school board erected a school house in the disputed territory, which had ever since been open and attended. The by-law thus passed was acted upon for nearly three years, and no motion made to quash it. In November, 1876, at a meeting of the county inspector and the Reeves of Bracebridge and Macaulay, with a representative from each school board, to alter the boundaries of the Bracebridge section, a portion of the disputed territory was set off to Macaulay, and the other portion retained by Bracebridge.

Held, that the by-law was not invalid on its face, nor beyond the jurisdiction of the council.

Held, also, that after the passing of the by-law the disputed territory became detached from Bracebridge,

and came under the control of the township school board, and continued thereunder notwithstanding the action of November, 1876; and that at all events under sec. 6, subsec. 7 of 40 Vic. ch. 16, O., it became so detached on 1st of January, 1878.

Held, also, that under 40 Vic. ch. 16, sec. 6, subsec. 1, the territory in dispute was not necessary to be considered in ascertaining the two-thirds majority, and that it did not appear to be necessary even under sec. 48, of 37 Vic. ch. 28, O.—*Re Minister of Education and Public School board of Macaulay, &c.*, 122.

REASONABLE CONDITIONS.

See INSURANCE, 3.

RECEIPT.

Under seal—Action for unpaid purchase money—Equitable right to recover.]—*See* ADMINISTRATION OF JUSTICE, ACT, 1873.

REFORMATION.

Of deed]—*See* ADMINISTRATION OF JUSTICE ACT, 1873.

Of contract]—*See* DEED—INSURANCE, 5.

REGISTRATION.

Conveyance after marriage under prior parol agreement—Unregistered title—Registry Act of 1865, 29 Vic. ch. 24, sec. 62.]—In this case the patent to the land in question issued in 1839. The patentee conveyed to

M. in the same year, and M. to the plaintiff in 1867, which was never registered. Defendant claimed through his wife, who was one of the co-heiresses of the patentee. He alleged that before his marriage, which took place in November, 1866, she agreed verbally to convey it to him after the marriage; and the deed under which he claimed was executed and registered in October, 1867: *Held*, that the conveyance to defendant was voluntary, and therefore could not prevail by reason of its priority of registration.

Per GALT, J.—If the defendant had been a purchaser for valuable consideration, he would have been entitled to succeed under 29 Vic. ch. 24, sec. 62, by reason of such priority. *Quære*, *per* WILSON, C. J., whether section 62 applies to cases where the patent has issued before its passing. *McCarthy v. Arbuckle*, 529.

See HUSBAND AND WIFE, 3.

RELEASE.

See INSURANCE, 10.

RENEWAL.

Of policy.—*See* INSURANCE, 12.

RENT.

See LANDLORD AND TENANT.

REPAIR.

Bridge—Liability—*See* WAYS, 2.

REPLEVIN.

Replevin bond—Delay in proceeding—Damages.—In an action for breach of a replevin bond for not prosecuting the replevin suit without delay, the plaintiff at the trial was awarded as damages, the amount of the rent distrained for. On motion in term, on the defendants undertaking to bring the replevin suit down to trial at the next assizes, the damages were reduced to a nominal sum.—*Churchill v. Denham et al.*, 474.

See SALE OF GOODS, 2.

ROAD.

See WAYS.

RULE.

Court equally divided—Rule discharged for purpose of appeal.—*See* LIMITATIONS, STATUTE OF.

RULES NISI.

When motions to be made for—Power of court.—*See* TRINITY TERM.

RULES OF COURT.

Respecting the fees of real representative.—246.

Dispensing with Trinity Term.—246.

For trial of controverted elections.—433.

SALE OF GOODS.

1. *Action for the price of liquors—Plea, that the liquors were furnished to be sold without a license—Evidence.*—To an action on the common counts for goods sold and delivered, defendant pleaded as to so much of plaintiff's claim as is for intoxicating liquors, &c., that defendant was not the holder of a license authorizing him to sell spirituous and malt liquors, but was accustomed to sell such liquors without license, and the plaintiff well-knowing this, and with the intention of aiding and enabling the defendant to carry on such illegal traffic as aforesaid, sold to the defendant large quantities of spirituous and malt liquors, which are part of the goods for which the plaintiff seeks to recover. The arbitrator to whom it was referred to find the facts for the opinion of the Court, found that while the defendant was accustomed to and did sell such liquors without a license, the plaintiff knowing this sold to the defendant intoxicating liquors, &c.,

Held, that the plea was bad, because by the License Act and other enactments, there was a class of persons, to-wit, druggists, &c., who might sell without license, and the plea did not allege that defendant was not one of such class; and that the finding of the arbitrator did not go as far as the plea, for that it was quite consistent with the finding that the liquor was sold to defendant for his own consumption.—*Kelly v. Earl*, 477.

2. *Property passing—Special contract—Replevin.*—T., the plaintiff, delivered certain articles to one C. under a special contract contained in four notes made by C. in the following form: "For value received, No-

vember 1st, 1877, after date we promise to pay to the order of T. \$81.67. The consideration of this and the other notes is one Arctic Apparatus," &c., "which we have received of said T. Nevertheless, it is understood and agreed between us and T., that the title to the above-mentioned property does not pass to us, and that until all such notes are paid the title to the aforesaid property shall remain in T., who shall have the right in case of non-payment at maturity, of either of said notes, without process of law, to enter and re-take, and may re-enter and re-take immediate possession of the said property wherever it may be, and resume the same," &c. C., without payment of the notes, sold and delivered possession of the said articles to defendant, who was then unaware of the plaintiff having any claim on them, but on subsequently discovering it, negotiated for a new bargain with the plaintiff, which was not made. There was no demand and refusal of the articles. The plaintiff having brought replevin, to which defendant pleaded *non cepit*, and that the goods were defendant's.

Held, that the defendant was entitled to succeed on the first issue, for that the goods came lawfully into his possession, so that without a demand and refusal, trespass or trover, and therefore replevin would not lie; but that the plaintiff was entitled to succeed on the second issue, as under the terms of the notes the property in the goods continued in him.—*Tuffts v. Mottashed*, 539.

Property passing.—See **BILLS OF SALE AND CHATTEL MORTGAGES.**

Admixture of property—Conversion.—See **TROVER.**

See **LIQUIDATED DAMAGES—PARTNERSHIP.**

SALE OF LAND.

Action for unpaid purchase money
—*Receipt under seal*—*Equitable*
right to recover.]—See ADMINISTRATION OF JUSTICE ACT, 1873.

Subject to mortgage.]—See MORTGAGE.—DEED.

SCHOOLS.

See PUBLIC SCHOOLS.

SCIRE FACIAS.

Assets quando acciderint—*Lands.*]—*A sci. fa.* upon a judgment of assets *quando acciderint* must not pray execution of assets generally, but only of such assets as have come to the executor's or administrator's hands since the recovery of the judgment.

A sci. fa. on a judgment against defendant as executrix under the will of C., deceased, alleged that lands as well as goods and chattels had come to the defendant's hands as such executrix to be administered, and prayed execution thereon.

Held, that the lands of which the testator died seized did not become assets in the hands of the executrix to be administered; and there being no evidence of any goods and chattels having come to the defendant's hands as such executrix, a verdict was entered for the defendant.

The Court intimated that the plaintiffs could obtain execution against the lands in the ordinary way.—*Consolidated Bank v. Cameron, executrix*, 71.

See CORPORATIONS, 2, 3.

SEAL.

Receipt under—*Action for unpaid purchase money.*]—See ADMINISTRATION OF JUSTICE ACT, 1873.

Omission of to policy of insurance—*Equitable relief*—*Reformation*]—See INSURANCE, 5.

See INSURANCE, 12.

SECURITIES.

See INSOLVENCY, 3.

SEIZURE.

Under distress warrant—*What constitutes.*]—See DISTRESS.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SHARES.

See CORPORATIONS.

SHERIFF.

Fees of—*Conclusiveness of audit of county board of auditors.*]—See MUNICIPAL CORPORATIONS.

SOLICITOR,

See ATTORNEY AND SOLICITOR.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES, CONSTRUCTION OF.

C. S. C. ch. 66, sec. 80.]—*See* CORPORATIONS, 2.

C. S. U. C. ch. 73, sec. 2.]—*See* HUSBAND AND WIFE, 2.

C. S. U. C. ch. 126, sec. 10.]—*See* WATER WORKS COMMISSION.

29 Vic. ch. 24, sec. 62.]—*See* REGISTRATION.

32 Vic. ch. 36, secs. 18, 128, 155, O.]—*See* ASSESSMENT AND TAXES.

34 Vic. ch. 47, sec. 13, D.]—*See* DEBENTURES.

35 Vic. ch. 12, sec. 2, O.]—*See* DEBENTURES.

35 Vic. ch. 79, secs. 28, 35, O.]—*See* WATER WORKS COMMISSION.

36 Vic. ch. 8, secs. 2, 6, 20, O.]—*See* ADMINISTRATION OF JUSTICE ACT, 1873.—HUSBAND AND WIFE, 4.

36 Vic. ch. 44, secs. 32, 36, 40, O.]—*See* INSURANCE, 1, 9, 12.

36 Vic. ch. 48, sec. 422, O.]—*See* WAYS, 1.

37 Vic. ch. 9, sec. 104, D.]—*See* PARLIAMENT, 1.

37 Vic. ch. 10, D.]—*See* PARLIAMENT, 1.

37 Vic. ch. 28, sec. 48, O.]—*See* PUBLIC SCHOOLS.

40 Vic. ch. 16, sec. 6, sub-secs. 1, 7, O.]—*See* PUBLIC SCHOOLS.

R. S. O. ch. 49, sec. 45.]—*See* PARLIAMENT, 1.

R. S. O. ch. 50, secs. 267, sub-sec. 2, 284.]—*See* INTEREST—TRINITY TERM.

R. S. O. ch. 125, secs. 6, 20.]—*See* HUSBAND AND WIFE, 4.

R. S. O. ch. 161, sec. 41.]—*See* INSURANCE, 13.

R. S. O. ch. 162.]—*See* INSURANCE, 10.

STATUTORY CONDITIONS.

See INSURANCE, 3, 4, 7, 11, 12.

STOCK.

See CORPORATIONS.

STREET.

See WAYS.

STORAGE.

Charge for.]—*See* TROVER, 1.

SUICIDE.

See INSURANCE, 5.

SURGEON.

Malpractice.]—*See* MEDICAL PROFESSION.

TAXES.

See ASSESSMENT AND TAXES.

TEMPEST.

Accident by.]—*See* LANDLORD AND TENANT, 1.

TENANCY AT WILL.

See LIMITATIONS, STATUTE OF.

TERM.

See TRINITY TERM.

TIME, COMPUTATION OF.

See CORPORATIONS, 1.

TITLE.

To land—Certificate for costs.]—
See COSTS.

Unregistered.]—See REGISTRATION.

See INSURANCE, 8.

TORT.

See HUSBAND AND WIFE, 4.

TOWNSHIP.

See PUBLIC SCHOOLS.

TRESPASS.

See SALE OF GOODS, 2.

TRIAL.

Practice—Discharge of jury during trial—Waiver.]—Where the trial of a cause begins and is entered into with or without a jury, as the case may be, it must be finished in like manner, unless by consent of parties.

In an action of trespass *quare clausum fregit*, the trial was commenced with a jury, but an objection of a technical character having been taken by defendants' counsel to the plaintiff's evidence of a title deed offered in rebuttal, the learned Judge granted an adjournment to enable him to cure the defect, discharged the jury, and afterwards resumed and finished the case without a jury. The defendants' counsel objected to the discharge of the jury, but continued to act in the case without

further objection, and the plaintiff obtained a verdict.

Held, that the course pursued was unauthorized; but *Semble*, that the defendants' counsel by proceeding with the defence, and taking his chance of a verdict, had waived the objection.—*Denmark v. McConaghy et al.*, 563.

TRINITY TERM.

Sittings of the Court dispensed with—When motions for rules nisi to be made—Power of Court.]—*Held*, that although the Court may, by rule thereof, have dispensed with the sittings of the Court during Trinity Term, it is still a term of the Court, and motions for new trials in cases tried at the Summer Assizes at Toronto, &c., must be made during the first four days thereof.

Held, also, that notwithstanding the R. S. O. ch. 50, sec. 284, the Court have power to entertain such motions after the expiration of the four days.—*Rooney v. Rooney*, 347.

[This case has been affirmed on appeal.]

TROVER.

1. *Conversion of goods—Evidence Charge for storage.*]—The plaintiff at Guelph, sold to B. & Co., at Ottawa, 65 barrels of pork, and shipped it by the Great Western Railway Company, the shipping receipt acknowledged the receipt of the same, addressed to the plaintiff's order at Prescott, and to notify B. & Co., Ottawa. The pork was carried by Great Western Railway and steamer *Passport* to Prescott, her manifest shewing a delivery there into the defendant's charge, and stating that

the plaintiff was owner, and that B. & Co., were to be notified. B. & Co., were large dealers in Ottawa, and all goods for them or in which they appeared interested were, by arrangement with the defendants, sent on to Ottawa. This pork was accordingly sent on and inspected by B. & Co., who refused to accept it. The plaintiff, who was fully aware of all that had occurred, demanded the pork from the defendants' agent at Prescott, but at the same time requesting him to endeavour to get B. & Co. to accept it. The agent refused to deliver up the pork unless the storage charges were paid, which the plaintiff refused to do.

Held, that the carrying of the pork to Ottawa did not in itself constitute a conversion.

Held, also, that the plaintiff's refusal to pay the storage charges would prevent his recovery.—*Gauhan v. St. Lawrence and Ottawa R. W. Co.*, 102.

[This case has been affirmed on appeal.]

2. *Sale of goods—Admixture of property—Trover—Conversion.*]—The plaintiff, a farmer, left 552 bushels of barley with defendant, getting a receipt from defendant of his having received it from the plaintiff in store. The plaintiff intended to sell it to defendant, but as the market price was low it was left with him. The defendant mixed it with other barley and sold it, dealing with it as his own, the plaintiff being at liberty, at any time, to accept the market price, or to call for the return, not of the identical barley, but of an equal quantity of the same quality, but no price was ever agreed upon, nor any barley returned. The defendant's premises were destroyed by fire, and he having refused either to pay for the barley or to return a

similar quantity, the plaintiff sued him in trover and on the common counts,

Held, that in any event the plaintiff must succeed, for that the defendant must be deemed either to have been guilty of a conversion in disposing of the plaintiff's barley as his own or to have acquired the property in it.—*Benedict v. Ker*, 410.

See SALE OF GOODS, 2.

ULTRA VIRES.

See CORPORATIONS, 3—PARLIAMENT, 1.

VALUE.

Of insured property.]—See INSURANCE, 3, 11.

VILLAGE.

See PUBLIC SCHOOLS.

WAIVER.

See INSURANCE, 1—TRIAL.

WAREHOUSE RECEIPTS.

See INSURANCE, 4.

WARRANT.

Distress.]—See DISTRESS.

WARRANTY.

See INSURANCE, 3, 6, 12.

WIFE.

See HUSBAND AND WIFE.

WATER WORKS COMMISSION.

Water Works Commission of Toronto—Action against City—Limitation of action—Notice of action—35 Vic. ch. 79, O., C. S. U. C. ch. 126, sec. 10.]—In an action against the city of Toronto for the non-repair of certain main pipes laid down in one of the streets for waterworks purposes, whereby the plaintiff's premises were injured, it appeared that the action was originally commenced against the Water Works Commission, and that the present defendants were substituted therefor by the Judge's order, but with all the rights and privileges of the original defendants.

Held, that if the action should have been brought against the present defendants in the first place, then by the terms of the said order the action must be deemed to have been commenced against them on the making thereof, at which date it appeared that more than a year had elapsed from the cause of action arising, so that the action would be barred under the 35th section of 35 Vic. ch. 79, O.; but that if the action was properly commenced against the Water Works Commission, then the defendants, being entitled by the terms of the said order to avail themselves of every defence

the commission could have had, could set up the want of notice under sec. 28 of the 35 Vic. ch. 79, O., and the C. S. U. C. ch. 126, sec. 10: so that in either event the plaintiff could not recover.—*Trotter v. Corporation of Toronto*, 365.

WAYS.

1. *By-law—Closing up road—Ingress and egress—Compensation.]*—Under sec. 422 of 36 Vic. ch. 48, O., the owner of land abutting on a particular road has an interest therein as affording ingress and egress to his land over such road, and he cannot be deprived of that advantage against his will without compensation.

Where a by-law was passed by a township corporation for closing up a public road, whereby the plaintiff was excluded from ingress and egress to and from his land which abutted thereon, and did not provide any compensation to the plaintiff: *Held*, that the by-law was invalid, and must be quashed.—*Re McArthur and Corporation of Southwold*, 216.

[This case has been reversed on appeal.]

2. *Bridge—Want of repair—Liability—Evidence.]*—In an action against defendants for damage sustained by the plaintiff through the breaking down of a bridge some six feet wide built on three sleepers over a culvert on a road in defendants' township, over which the plaintiff was attempting to drive with a buggy and a pair of horses, it appeared, from an examination after the accident, that the centre sleeper to two-thirds of its diameter and on the outside was quite rotten, and that its

condition was either not ascertained by the persons whose duty it was to repair the bridge, or, if ascertained, it was not repaired, and that the bridge broke down in consequence of this centre sleeper giving away by the mere entry of the plaintiff's horses, without the buggy, upon the side of the bridge. The jury having found for the plaintiff their verdict was upheld.—*Macdonald v. Corporation of South Dorchester*, 249.

WORDS, MEANING OF.

Exposure to obvious danger.—See INSURANCE, 5.

Owner.—See INSURANCE, 8.

Accident by tempest.—See LANDLORD AND TENANT, 1.

WORK AND LABOUR.

Agreement to pay for in shares of company—Validity of.—See CORPORATIONS, 3.

